IN THE
UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ROANOKE DIVISION

ALEXANDRA BELLOFATTO,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Case No. 7:14cv00167
	)	
RED ROBIN INTERNATIONAL, INC.,	)	
	)	
Defendant.	)	

MEMORANDUM IN OPPOSITION TO
DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

Defendant Red Robin International, Inc. ("Red Robin" or "defendant") has filed herein a motion for summary judgment and supporting memorandum [ECF 31, 32]. Material questions of fact preclude summary judgment. The motion is therefore without merit and must be denied.

INTRODUCTION

There may be no company in the modern era like Red Robin. This case demonstrates the complete failure of a major restaurant chain to comply with federal law. In her first job after graduating from Radford University, Alexandra Bellofatto found work as a waitress for Red Robin at one of its restaurants in Christiansburg, Virginia. There she was assigned to work with a serial predator who targeted young female servers and for months groped and fondled and made inappropriate sexual comments to many of them (e.g., "grabbed a Team Member by the hair and said I bet you like it when your boyfriend does this, [ ] hit a Team Member on the butt with a serving tray" and made comments such as "I would sleep with you; sometimes when I'm having sex I think of you; I want to lay down and taste you; and if money's a problem we can work something out") (Exhibit 1) — all while management stood by and did absolutely nothing to stop it (management "heard things in the past;" "some tms [team members] have taken offense" (Exhibit 2, at 408); "gone to mgrs. 3X & he's been spoken to" (Id., at 406); "some people complain about Phil [Sellers, the harasser]" (Id., at 410); "mentioned it to managers before – Matt [Pero], and he didn't do anything about it" (Exhibit 3, at 463); "[n]ext to Laura when she told [manager] Matt [Pero] about the harassment and he was more concerned about Phil paying people to roll his silver[ware]" (Id., at 464); "Laura talked with Matt who said *there's nothing they can do about it, refused to help*" (Id., at 465) [Emphasis added]) — and then, after receiving complaints from helpless servers at the Christiansburg store, and faced with a flood of "at least 50" sexual harassment complaints across the country (Kristy Boyd Deposition, Exhibit 4, at 50) perhaps because, unlike most employers in the modern era, *Red Robin does not have a zero tolerance policy for sexual harassment* (Id. at 47), HR in Colorado failed and refused to travel in person to Virginia to investigate the atrocities there because in the words of Red Robin's human resources manager in Colorado, "[i]f I had to talk to everybody in person, I would never be home *and would be flying nonstop across the country to conduct investigations*" (Id. at 32) [Emphasis added]. Stunningly, Red Robin did not fire the harasser immediately and did not order him to keep his hands off the servers (Id. at 54)[1] but instead put him back to work side-by-side with his victims because, in the words of the general manager, "guests love him & give him tons of complements" (Ex. 2, at 408). Predictably, with far less than a slap on the wrist, Sellers was emboldened and in short order went right back to tormenting the young female servers ("3 things that gave me headaches tonight … Laura [George, a server] has accusations that Phil [is] making inappropriate jokes and touching her rear" (Captain's Log, 2.22.13, Exhibit 5); "hugs girls *more than he did previously*" (Ex. 3, at 464) [Emphasis added]; "Phil makes sexual comments to her and she's told him to stop and he hasn't. … touched her stomach and back; "mentioned it to managers before … didn't do anything about it;" "*his touch is very different* … he keeps his hands there longer and it's uncomfortable;" "those jeans make your butt look so good, so squishy;" "[y]ou go to the club wearing miniskirts to show off your booty" (Id., at 463-64) [Emphasis added]; "Phil will make nonstop comments about Laura's ass and comments of her being so beautiful … talked with [manager] Matt [Pero] who said there's nothing they can do anything about it, refused to help" (Id., at 465).[2]

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[1] Q And did you instruct Dave Maranto or any of the managers to tell Phil Sellers, in no uncertain terms, "you keep your hands off the servers"?
A I don't recall.

(Ex. 4, at 54).

The hostile work environment did not end until Red Robin terminated Sellers' employment in March 2013. Even then, and in the face of overwhelming evidence, the general manager protested, "[g]oing to be a big loss to the restaurant because Guests ... absolutely love Phil" (Ex. 3, at 466). The evidence is therefore more than sufficient to overcome summary judgment with respect to the sexual harassment claim.

[2] Sellers' advances were not limited to employees. Management was also aware that Sellers came on to female customers at work. On October 13, 2012, one manager recorded, "need to watch Philip, noticed him giving his phone # to 2 girls sitting at the bar after talking to them a while" (Captain's Log, 10.13.12, Exhibit 6). According to HR, such conduct would be "inconsistent with Red Robin policy." Not surprisingly, management in Christiansburg never reported the conduct to HR in Colorado (Ex. 4, at 25).

Similarly with respect to the disability discrimination claim, Bellofatto is a Type 1 diabetic, juvenile onset, insulin dependent, who must occasionally take short breaks to eat or drink something as needed to control her blood sugar. As is her custom, Bellofatto made this most modest request for accommodation known from the day she was hired in case something happened to her at work. Instead of granting the request, however, as will be shown, the same managers who ignored Sellers' conduct also chided and berated Bellofatto and refused to permit her to take breaks as needed to control her diabetes — to the point she occasionally was reduced to shaking uncontrollable and crying at work — and recorded instead that

> [u]ntil she learns to control her diabetes better, any long shifts she has only ends up with her in tears complaining about her blood sugar being too high or too low. I completely understand the seriousness of diabetes and the need to control it, but she clearly is not taking the proper steps here. It does me no good when my closing server is crying from the minute the door's locked until she leaves. We see the same behavior when she works a double. It seems to me that we need to keep her to short, volume-only shifts.

(Matt Pero Deposition, Exhibit 7, at 108; Captain's Log 8.18.12, Exhibit 8). As will be shown, in response to Bellofatto's request for accommodation, Red Robin reduced her hours and assigned undesirable shifts, all in contravention of federal law. As with the sexual harassment claim, the evidence here is more than sufficient to overcome summary judgment with respect to the disability discrimination claim.

FACTS

As stated, Red Robin is a large restaurant chain with over 300 restaurants in the United States and Canada. Alexandra Bellofatto went to work as a waitress for Red Robin in its Christiansburg, Virginia location on May 18, 2012 after receiving her bachelor's degree from Radford University (Alexandra Bellofatto Deposition, Exhibit 9, at 8, 86).

Red Robin Refused to Accommodate Plaintiff's Disability

In March 2007 Bellofatto was diagnosed with Type 1 diabetes (Ex. 9, at 10). As a Type 1 diabetic, she is insulin dependent (Id. at 10). During Bellofatto's interview with Red Robin, she informed her soon-to-be manager, Dave Maranto, that she had diabetes (Id. at 146-47).[3] She requested that an accommodation be made to allow her to check her blood sugar as needed, and that if she had low blood sugar, to sit down and eat or drink something to raise her blood sugar (Id. at 149). Maranto at the time said that would not be a problem (Id.). And, Bellofatto had worked at a different Red Robin location previously and had no issue getting the breaks that she needed there and thus did not anticipate there being an issue at the restaurant in Christiansburg (Id. at 148).

Unfortunately, Bellofatto was wrong. She was not permitted to take breaks to check her blood sugar and correct it when it was low. For instance, as Bellofatto recalled at deposition,

> [T]here was one time I was told that -- I asked Matt Pero, I said, "Can I have a break? I have a double. I need to go eat something or I'm going to

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[3] As Bellofatto explained, it is her practice to inform people upon meeting them that she has diabetes,

> I'm not shy about being a diabetic. Pretty much one of the first things I tell people is, "I'm diabetic." Because heaven forbid, I ever have an experience and I pass out and I'm unresponsive, people need know, like Hey, this girl has diabetes. We need to get an EMT. Yeah, so I'm not shy about it. I always tell people.

(Ex. 9, at 153). Tellingly, another Red Robin server, Amanda Johnston, recalled that Bellofatto told her very early on that she had diabetes, and that "I think pretty much everybody knew that she had it because she talked about it a lot" (Amanda Johnston Deposition, Exhibit 10, at 6-7). Similarly, another manager, Glen Leidich, explained, "When I first got there she said she had diabetes and needed a break from time to time" (Glen Leidich Deposition, Exhibit 11, at 69).

> pass out." And he was, like, "Well, what was your bev PPA this morning?" And he looked at my bev PPA, which is an average of how much I had sold beverage-wise and it wasn't over a certain range that he wanted. So he just totally disregarded me and walked away. And when I asked again, he wasn't going to give me one. I didn't get one until the p.m. manager showed up that night.

(Id. at 150). As Bellofatto told Matt Pero, a manager at Red Robin at the time, she ran the risk of passing out if she did not correct her blood sugar when it was low, "'Matt, I'm working a double. I'm having low blood sugar. I need to go take a break. I need to eat. I'm going to pass out.' He didn't care" (Id. at 154). And this incident with Pero was clearly not isolated,

> There were times when I would just ask, like, "Hey, I really need to order something and eat something. Can I do that?" It didn't matter. It was, "No, you've got tables. No, you need to get back on the floor. We'll phase you later. We'll deal with this later." I was, like, "No, I need to deal with this right now."

(Id. at 151). Bellofatto got sick from not taking the breaks that she needed. At deposition, Bellofatto recalled on one occasion when she did not get a break, she was physically crying and shaking by the time the night manager came in and gave her a break, "I thought I was going to pass out. I was dizzy, nauseous, sweaty, shaky. There's only so many hours you can work [like] that, and then you just break down because it hurts so bad" (Id. at 174). Instead of providing the modest accommodation needed to manage her diabetes, Red Robin management responded angrily,

> "Until she learns to control her diabetes better, any long shifts she has only ends up with her in tears complaining about her blood sugar being too high or too low. I completely understand the seriousness of diabetes and the need to control it, but she clearly is not taking the proper steps here. It does me no good when my closing server is crying from the minute the door's locked until she leaves. We see the same behavior when she works a double. It seems to me that we need to keep her to short, volume-only shifts."

(Ex. 7, at 108).

As Bellofatto told the managers throughout her employment, all she needed was a little time to sit down and eat,

> "You know, there's one of two ways this will go. Sometimes I'll just need a drink of Coke and it's totally okay and I'm fine, and sometimes I really need to sit down and eat, and I'll let you know if that happens." And I did [request a break], and they totally ignored it. . . . I made this clear multiple, multiple, multiple times. I need to sit down and physically eat something[.]

(Ex. 9, at 157). She would tell them this "[a]nytime [she][] had a low blood sugar and [] couldn't get a break" (Id.). Sometimes, Bellofatto could not even find a manager to ask for a break, and thus it was impossible to get permission to take a break (Id. at 187-88),

> So it just got to the point where I'd ask and people would ignore me or say no. And it just got to the point where I just did whatever I had to do so I didn't pass out. Whether it be force myself through to the end of the shift and then finally, whenever I was let go off my shift, go out and eat, or whether it was somebody was nice enough to give me a basket of fries or drink enough cups of soda to get through the end of my shift. I mean, the word break is used so liberally here. I mean, if I'm saying I need a break, I'm saying as Alex I need to sit down and eat. But I feel like breaks in general are being used to summarize me taking two seconds to drink a cup of soda.

(Id. at 207). As Bellofatto explained, the breaks she took surreptitiously were not sufficient,

> It wasn't really a break. I think that's where the miscommunication is. It wasn't the kind of break I was requesting, to sit down and eat something. It was the kind of break where it wasn't really a break. It was just me drinking soda and dealing with it, yes. I never got to just eat if I needed to just eat, yes.

(Id. at 208). And if Bellofatto got caught, she would get yelled at (Id. at 152-53, 208). Management would question why she was not cleaning or doing sidework even when she would tell them that she was not feeling well and needed to take a quick break (Id. at

160). Management's treatment eventually escalated into overt threats, "[a]nd then after a certain while, I would start getting pulled into the office, off of the clock, and that's when they started to threaten to cut hours, because I was told I was an emotional wreck who didn't know how to control her disease" (Id. at 161). "So they would continually make these comments and it made me feel like they were going to cut my hours. They had made small comments, like, Well, if you can't handle it, we'll cut your hours. Which I couldn't have because I needed to pay my bills. So it was a matter of I can't get this accommodation and I need to pay my bills" (Id. at 176). Red Robin made no bones about its animus — management told her directly that her hours were going to be cut, "I was told to my face, we're going to start cutting your hours because of your diabetes. Because you don't know how to control your diabetes, we're going to start cutting your hours" (Id. at 209). As Bellofatto noted, it was impossible for her to "control" her disease when she was not given the time to do so, "I can't take the proper steps to fix my disease if I'm not given the time to. If I could snap my fingers and fix it, I would" (Id. at 195).[4]

Management's threats eventually became reality, "[t]hey did cut my hours and I had to bend over backwards to pick up shifts. I used to be scheduled pretty okay shifts. I'd get, you know, four or five shifts a week, some weekends, some weekdays. And when all this started happening, I started getting nothing but weekday lunch shifts" (Id. at 209).[5] And management also retaliated against Bellofatto by assigning her the sections of the restaurant that were less profitable (Id. at 212). It is true that on paper Bellofatto's hours did not decrease, however, as she explained "it wasn't certainly from the help of management. It was because I was doing the hustle game and [picking][] up any shifts I could" (Id. at 226).

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[4] Bringing in her own food did not fix the issue either as she was still not given a break to eat it (Ex. 9, at 193-94).

[5] Management at Red Robin did not like employees complaining about issues, "I had one friend who worked there and he constantly raised issues with management, and management did not like him, so they started scheduling him for like Monday lunch and

Plaintiff's requested accommodation was obviously reasonable — as Dave Maranto put it, "she's not asking for the world" (Dave Maranto Deposition, Exhibit 12, at 64). But certain managers, including Maranto, just did not want to accommodate Bellofatto's diabetes. Luckily for Bellofatto, Jan Dilling, Julie Goad, and Will Carrico (all managers at Red Robin) usually gave Bellofatto breaks as needed and it "worked smoothly" (Ex. 9, at 181, 182). Bellofatto, however, often worked with other managers. And, Dilling, Goad, and Carrico were aware that the other managers were denying Bellofatto breaks, "Jan Dilling saw that I had been denied a break. She came in and I was upset and she asked why I was upset and I informed her I was working a double and they wouldn't give me a break. So when she came on, I finally got my break" (Id. at 28). "I think Julie [Goad] had mentioned something to her and she came over to talk to me, and I informed her 'I'm working a double. I asked Matt for break. I was not given a break. I need to eat before I pass out'" (Id. at 29). Both Julie and Jan recognized that Bellofatto was not being treated properly (Id. at 177, 179). Bellofatto also reported that she was being denied a break to managers Will Carrico and Sarah McCraw (Id. at 167; Ex. 12, at 50). Yet, nothing was done.

Tuesday lunch. We called them $5.00 shifts, because you walk out with five bucks in your pocket. It's nothing" (Ex. 9, at 210-11).

Despite Bellofatto's reports to management, her situation never improved. She therefore reported the discrimination to Kristy Boyd in HR.[6] Pursuant to Boyd's notes of her conversation with Bellofatto on October 22, 2012, Bellofatto reported to Boyd that she just needed to eat, but management was refusing to give her breaks, and that when she tried to talk with the general manager, Dave Maranto, about it, he just got mad (Ex. 4, at 58-59; Ex. 12, at 12). And ever intransigent, after Bellofatto complained to HR, Maranto did not try to remedy the issue, he just became angrier with her,

> David pulled me into his office before one of my shifts, and he yelled at me. He was like, "What's this I hear about HR? What's this I hear you're telling people? What's this? What's that?" And he was like, "I need a specific example." And I provided a few examples of times I had not [been given a break], you know. Of course, I don't remember because it's been so long. . . . And he got very aggressive, very aggressive, very fast, very defensive, you know, and this is before I even get on the clock. This is before my 13-hour double shift on Black Friday. Yelling at me, saying I'm an emotional wreck who doesn't know how to control her disease, same old story he's been pulling, and that he's going to start cutting my hours if I don't control my disease better. And then he was like, "Admittedly, I don't know anything about your disease, but you need to learn how to control it better."

(Ex. 9, at AB 200-01).[7]

HR did not properly respond, either (Id. at 198). Boyd sent Bellofatto's complaint along to Tara Juhrs, who handled the matter by telephone from her home in Oregon (Ex. 4, at 16-17, 59). Juhrs requested paperwork from Bellofatto's physician to corroborate that Bellofatto had diabetes and that she needed to eat if her blood sugar dropped. Bellofatto's physician provided this information — which corroborated what Bellofatto had been saying all along (Ex. 9, at 265). But Oregon is a long way from

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[6] Boyd is the HR generalist for Red Robin and works in their corporate headquarters in Colorado (Ex. 4, at 8, 9).

[7] Matt Pero also made similar comments to Bellofatto (Ex. 9, at 201).

Christiansburg, Virginia, and nothing changed for Bellofatto at work. Nothing was ever done to ensure that Bellofatto received the breaks that she needed. Bellofatto continued to complain to Will Carrico, Jan Dilling, Julie Goad, and Glenn Leidich, but nothing was done (Id. at 198). Instead, Maranto just continued to yell at Bellofatto when she requested a break (Id.). No matter what she did, she could not get the breaks that she needed, "I felt like I was beating a dead horse with a stick on the diabetes issue" (Id. at 244).

Bellofatto was Also Subject to a Hostile Work Environment at Red Robin

In addition to being denied breaks at Red Robin, Bellofatto and the other young female servers were subjected to a sexually hostile work environment. Phillip Sellers was a server at Red Robin while Bellofatto worked there. While the general manager at Red Robin maintained that Sellers was an excellent employee, Sellers was reported many times to management to have sexually harassed females servers, and was reported at least twice to HR in Colorado for sexually harassing female servers before he was finally terminated.

Soon after Bellofatto went to work for Red Robin, Sellers began to treat her like he treated many other young females at Red Robin,

> Q. When Mr. Sellers, according to you, pulled your hair in June of 2012, how did that happen?
> A. I was rolling silverware. Like, I was just -- management, anywhere you go wants you off the clock, you know what I mean? They don't want you hanging around racking up hours, so there was a good amount of pressure to get our side work done as fast as possible. So I'm in the zone. I'm rolling silverware, and I'm looking down. I'm just rolling silverware. I had short hair at the time, and he came up behind me. I didn't even see him, and he grabbed my hair.
> Q. And you think he said, "I bet you like it when your boyfriend pulls your hair," or something like that?
> A. He said that to me, right up against my face.

> Q. And what did you do?
> A. I pulled back. I said, "Don't do that."
> Q. Okay. Anything else?
> A. No. I said, "Don't touch me. Don't do that." I shot him a dirty look and he just walked away laughing like it was no big deal.
> Q. And then when did the tray incident -- I think you said in your interrogatory answer it was within a week to ten days after that?
> A. Yes.
> Q. Okay. So tell me about that. How did the tray incident occur?
> A. I was just walking through the line and I passed by him and he walked by and slapped me.
> Q. Okay. At the time, had you had any conversation with him before?
> A. I just -- the only time I had ever -- it was such a shock the first time he did it. So that was the one and only time he had done something, so I told him to stop right then and there. "Don't touch me. Don't do that," and he just laughed, and then he did it again. And then I was like, okay, clearly this message didn't come across clear enough the first time, so then I really yelled at him. I said, "Don't do that," and he was just like (descriptive sound). And then after that, he didn't touch me, but he certainly continued to make comments or tried to hug us.

(Id. at 123-25).[8]

Bellofatto reported the harassment to Will Carrico, assistant kitchen manager (Id. at 104, 117). Carrico related that he had continuously tried to talk with the general manager about issues with Sellers harassing female severs, to no avail, "And when I talked to him about it, he said that he had been continually, *continually trying to talk to Maranto and other people in management about the Phil issue, and nothing was done about it*" (Id. at 104) [Emphasis added]. Reporting the harassment to the general manager had thus proved useless, "So not only was I trying to talk to the manager on duty and I tried to talk to, you know, in a way, talk and communicate with the general manager, it had been communicated with me that it was going to be useless and hopeless to talk to the general manager, because it already been decided that Phil was more

[8] As Sellers noted, "Like, again, I said I was, I am *aggressive* when it come to, like, getting to know people" (Phil Sellers Deposition, Exhibit 13, at 24) [Emphasis added].

important as a server to the restaurant to make the restaurant look better than the actual workplace itself" (Ex. 9, at 106).[9] Bellofatto also reported that she was having issues with Sellers to other managers, "but it just kind of got dismissed in general" (Id. at 112). Instead, in her first job out of college, she was forced to endure a hostile environment at work (Id. at 120). Sellers continued to try to hug Bellofatto, and would put his arm around her (Id. at 128), hit on her, and call her derogatory names, "[H]e would still, like, be like, 'Hey, how you doing? And try to, like give us hugs or try to, you know, call us, like sweetie or honey or whatever. But if he tried, I shot him down. It was like just like, Don't touch me, gross" (Id. at 120). "He would comment on how I looked. I mean, there was one time I'd said I was struggling with money and he offered we could work something out. But just comments, or 'How are you doing today, beautiful?' Or 'Do you know how lucky your man is to have you?' Things like that" (Id. at 143). "They were done in a sexual manner. It was very disgusting" (Id.). "[T]he way he looked at me when he said those words, the body language that came across when he said those words, it was in a very sexual manner" (Ex. 9, at 143-44). With management completely ignoring the harassment, Sellers appeared to be proud of himself that he could get away

[9] As will be later shown, Maranto protected Sellers. When human resources spoke with him about the harassment in October 2012, he stated, "guests love him & give him tons of complements" (Ex. 2, at 408). The record establishes conclusively that every complaint concerning Sellers was ignored ("gone to mgrs. 3X & he's been spoken to" (Id. at 406); "some people complain about Phil" (Id. at 410); "mentioned it to managers before – Matt, and he didn't do anything about it" (Ex. 3, at 463); "[n]ext to Laura when she told [manager] Matt [Pero] about the harassment and he was more concerned about Phil paying people to roll his silver[ware]" (Id at 464); "Laura talked with Matt who said there's nothing they can do about it, refused to help" (Id. at 465). Even manager Dave Maranto stated specifically that he had "heard things in the past," and that "some tms [team members] have taken offense" (Ex. 2, at 408). And on the day Sellers was finally discharged, Maranto stated, wistfully, "[g]oing to be a big loss to the restaurant because Guests who absolutely love Phil" (Ex. 3, at 466).

with this. For instance, Bellofatto recalled his demeanor when he hit her butt with a serving tray,

> [T]he way he carried himself, his body language, the way he looked at me, the face he made at me afterwards. It was kind of like ha ha, you know. . . . [I]t wasn't joking, it was like, I just hit this girl in the butt. Look at me. . . . Like he was proud of himself that he had just done this.

(Id. at 145).

Bellofatto was by no means the only young female employee harassed by Sellers. As Bellofatto explained, "He was harassing all of us females and we all felt very upset by it" (Id. at 32). For instance, Kourtni Knobel was also a server at Red Robin. Sellers made similar remarks and touched Knobel. Knobel reported the harassment to managers, but nothing was done. Therefore, after being harassed for 8 months, she reached out to HR in Colorado on October 18, 2012 (Ex. 4, at 13, 18, 20, 45).[10] Kristy Boyd, HR generalist in Colorado, spoke with Knobel. Knobel reported to Boyd that managers had been approached three times and claimed to have spoken to Phil, but that Phil still asked her out and when she refused his advances would not leave the hostess stand until he hugged her, and that he would make other sexual comments. For instance, he commented on female patrons, "Did you see the ass on her. He likes big women & would totally do her" (Ex. 4, at 40-41; Exhibit 12). Knobel provided the names of other individuals to HR who had been either harassed by Sellers or saw Knobel being harassed by Sellers. Bellofatto was one of those individuals. She spoke with Boyd on October 20, 2012 (Ex. 9, at 133). Bellofatto also reported to Boyd that Sellers was sexually harassing her. Boyd recorded that Bellofatto reported to her,

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[10] David Maranto, general manager, admitted to HR that he had heard things in the past and knew that employees were offended by Phil's treatment (Ex. 2).

Alex told me -- it says, “Phil says things. ‘I want to lay down and taste you.’ Hits on team members. ‘Your boyfriend is lucky to have you. You’re so sexy.’”

…

A. “Sexually assaulted. Grabbed her hair and said, ‘I bet you like it when your boyfriend pulls your hair,’ mid-June of 2012.”

…

A. “He hit her on the butt with a tray. Will Carrico, manager, saw this, mid-July of 2012.”
A. “She’s told all the managers, and they said they’ll talk with David.”
Q. David would be Dave Maranto[, general manager]?
A. Correct, yes, sir.
Q. Dropping on down, I cannot read this. “He asked” something --
A. “CDT.” Certified designated trainer.
Q. What does that mean?
A. A CDT at the time was someone who was a trainer within the restaurant who would train new hires and hold more of a leadership role but still as an hourly team member.
Q. Okay. So you write there, “He asked” -- read that -- those two lines.
A. “He asked CDT out on his first day. Heather, Richmond, transferred there.”
Q. Okay. And the next line says, “Asked” something?
A. “Asked Holly, ‘Are you a virgin?’”
Q. What’s Holly’s last name?
A. I do not know.
Q. Was she another female employee at Red Robin?
A. I would presume, yes.
Q. What is Red Robin’s policy on male employees asking female employees whether they’re virgins?
A. We don’t have a specific policy as to whether specifically they’re allowed to ask someone if they’re a virgin.
Q. So that’s not prohibited?
A. We don’t have a policy that specifically says you’re not allowed to ask, “Are you a virgin?”
Q. Can you understand how some female employees might be offended by a male employee asking them whether they’re a virgin?
A. I can understand that.

…

Q. The next line, you say, “Emily.” Emily. And then what do you -- what do you write there?
A. “Told her Alex and him were dating. Convinced her to meet him for ice cream to train her.”
Q. And then there’s something about Tawney. What do you write there?
A. “Tawney, ‘I want to lay down and taste you.’”

…

Q. The next page, again, recording your conversation with Alex. You begin writing -- and you've got something in quotes. Read those three lines, please.
A. "'If money is a problem, we can work something out,' told to Alex."
Q. By Phil Sellers?
A. I believe it was from Phil, yes, sir.
Q. And the next two lines, I can't read that.
A. "Think all the managers know, and they've said they'll talk with David."
Q. And the next two lines, "Recent"?
A. "Recent. Haven't worked with him recently because of hours."
Q. And then the next two lines?
A. "He'll harass new team members. He acts up and hits on new hires."
Q. And then the next five lines say what?
A. "He said, 'I hate snitches.' Think he's been talked with. Not as bad after she's told him to stop. Occasionally will try to get a hug, high five."
Q. And then you asked "anything else" -- you and I talked about that earlier -- and she said what?
A. "Not doing side work. Hate going to work when he's there."
Q. That's what Alex Bellofatto told you?
A. That's what she told me, yes, sir.
Q. Did you tell her, Don't worry; you'll never have to work with him again?
A. No, sir.

(Ex. 4, at 62-69) [Emphasis added].

Again, Bellofatto reported the harassment — this time to HR — and, nothing was done, "I tried telling Kristy and nothing got taken care of. Phil was still harassing me . . . . Comments to those effect continued throughout my entire employment there" (Ex. 9, at 256). "He made comments to everyone, including myself, that -- he would say things like that. Like, 'Oh, wow, you look so fine today. Oh, I like it when your hair is like that, girl.' Stuff like that, in a sexual manner" (Id. at 258). "'I think you look good,' [he would make] some sort of crazy licking face. 'Daddy's home.' Things like that, in a disgusting [manner]" (Id. at 258-59). And the touching did not stop either, "[H]e put his arm around me, and as he began to try to touch me or actually did physically touch my shoulder, I would push him off. So there was physical contact made, but for, like, a second, and I would push him off and tell him no" (Id. at 259).

Red Robin's own documentation records that Sellers made patently offensive comments to female servers such as "'I would sleep with you; sometimes when I'm having sex I think of you; I want to lay down and taste you; and if money's a problem we can work something out" and assaulted and battered female servers ("grabbed a Team Member by the hair and said I bet you like it when your boyfriend does this, and hit a Team Member on the butt with a serving tray") (Ex. 1). Stunningly, in the general manager's eyes, none of these reports amounted to anything that would warrant reprimanding Sellers — let alone terminating him (Ex. 12, at 18, 55).[11] And, at the end of the day, "it's Dave's restaurant" (Ex. 11, at 62).[12] Therefore, Maranto decided not to reprimand Sellers in any way, "[t]old him he wasn't being let go or punished but we wanted to review the policy so that he was clear on it hopefully to avoid any future instances" (Ex. 12, at 22). Not surprisingly, Sellers not only continued to harass female waitresses, including Bellofatto, he "hug[ged] girls *more than he did previously*" (Ex. 3, at 464) [Emphasis added].

Thus, little more than three months later on February 22, 2013, one manager recorded that, "3 things that gave me headaches tonight … Laura [George, a server] has accusations that Phil [is] making inappropriate jokes and touching her rear" (Ex. 5). Remarkably, management never reported the continued harassment to HR,

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[11] Sellers also no-called, no-showed, which is usually a "voluntary termination" (Ex. 11, at 49-50), but Sellers was not fired because Maranto protected him (Id. at 60).

[12] Manager Dave Maranto's disdain for women is palpable, and public. He published on Facebook a photograph of a man reading an extraordinarily large book entitled, "Understanding Women" (Dave Maranto Facebook Posting, Exhibit 14). According to Maranto, "That's a funny one. I like that one" (Ex. 12, at 13).

Q. Was that information passed along to you by the managers prior to the time Laura [George] called and spoke with you about March 8, 2013?
A. No, sir, it was not.
Q. Should it have been?
A. It should have been, yes, sir.

(Ex. 4, at 115).

Shortly thereafter, George called HR again on March 6, 2013 to report that Sellers was sexually harassing her. Kristy Boyd again received a complaint from a female server at the Christiansburg Red Robin about Sellers sexually harassing her,

> A. "Phil, don't like coming to work with him. Phil makes sexual comments to her. She has told him to stop, and he hasn't. He's touched her stomach and her back. Been going on since she first met him. Probably January 2013. Doesn't usually work his shifts, and now that she's changed her schedule, she sees him.["] "He offered her friend, Kourtni Knobel, $20 to curl her hair because 'I think it's sexy.' Made her feel bad, and he said it in front of everyone. He's loud and obnoxious about it. Kourtni is leaving, and it's a deciding factor of her decision. Happened last week. Not sure who overheard. Told Glenn, manager. He's been very helpful and gave her my number.["] "*Mentioned it to managers before, Matt, and he didn't do anything about it.* When she talked with him, there was another issue, so she thinks he didn't really pay attention. Matt's normally" -- sorry -- "Matt's not normally like that." "'Those jeans, your butt looks so good in that, so squishy. You go to the club wearing miniskirts showing that booty off,' comments he makes. Last week, last shift they worked together, he made the mini skirt comment. "Touching. He'll take his fingers and tries to pinch her stomach in a way to say hi. Happened recently, within the last couple weeks. Back, last few weeks. His touch is very different. Not just behind as they are walking by. He keeps his hands there longer, and it's uncomfortable. Witness, Alex Bellofatto and Kourtni [Knobel."]

(Ex. 4, at 85-86) [Emphasis added]. When Boyd spoke again with Bellofatto, she explained that "Phil will make nonstop comments about Laura's ass and comments of her being so beautiful. Laura talked with Matt who said there's nothing they can do anything about it, refused to help" (Ex. 3).[13] Bellofatto had spoken with manager Jan Dilling about the problem, but still nothing was done (Id.). This time around, though, after HR received yet another complaint of sexual harassment, Red Robin had no choice but to terminate Sellers — but general manager Dave Maranto was not happy about it. In Maranto's eyes, Phil's termination was "going to be a big loss to the restaurant" (Ex. 12, at 48-49).[14] He in fact told Sellers that he was sad that he had to terminate him (Ex. 13, at 7).[15]

To make matters worse, other male employees also treated female employees in a similar manner. Sellers recalled that "[s]ome of the cooks were the same way to some of the female employees" (Id. at 12),

> Q …. Other than yourself, what employee that you know of was ever fired for sexually harassing anyone?
> A None, but I seen a lot of the -- some of the cooks would make crude jokes to some of the female employees. They never went into the office and got reprimanded. I've seen some of the bartenders talk to the other bartenders. They never got reprimanded. And then I would say, "Why me?" But I really don't know. I know a cook right now who probably is still there, he would grab on some of the female coworkers, and they're laughing and key-keying it up. And when I made a rude joke, people walk by, "Oh, Phil said this. Let me run back and tell the manager Phil said a joke," or, "Phil did this," or, "Phil did that."

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[13] Again, Matt Pero's notes reflect that it gave him a "headache" that Laura complained about Phil making inappropriate jokes and touching her rear (Ex. 11, at 66).

[14] After Sellers was fired, he was arrested for aggravated sexual assault (Ex. 9, at 279). David Maranto's response was not that he was glad that they had terminated Sellers before something like this happened at their store, rather, he was sad to hear that such a bad thing had happened to Phil — that being he had been arrested for forcible sexual assault on a female (Ex. 11, at 25-26; Ex. 12, at 16; Ex. 13, at 36). In fact, a sheriff showed up to arrest Phil at Red Robin for a separate issue while he still worked there, "Phil may not be working with us much longer - a sheriff showed up this morning with a warrant for his arrest. I've gotten his shifts covered for this weekend and made sure be won't be on next week's schedule. -M" (Captain's Log 5.29.12, Exhibit 15). Yet, he was not fired

[15] Phil Sellers personnel file is now missing. Not surprisingly, Dave Maranto controls the lock and key to the filing cabinet where the file was stored (Ex. 11, at 89).

(Ex. 13, at 19).

> Q Now, you said something about bartenders saying something inappropriate. Tell me what your heard.
> A I don't even know if they still work there. But there were some bartenders, "Hey, what are doing after work tonight? Let's go hang out. Maybe we can do this and -- or maybe have a couple of drinks and sleep together." Some of the cooks there grabbing on -- I witnessed and other coworkers witnessed guys -- I forgot his name. Jesus Christ. I'd see him if I go in there -- grabbing people['s] butt[s], giving them hugs and lifting them up and spinning them around and everything but…

(Id. at 20). This happened out in the open where everyone could see it, and with some frequency, yet the male cooks were never disciplined either (Id. at 21).

After enduring a work environment where she was denied breaks to control her blood sugar because she had diabetes, and where she was continuously either being sexually harassed or having to watch other female servers being sexually harassed, Bellofatto quit Red Robin and obtained employment in the fashion industry, "I was so miserable there from everything, from Glenn, from the sexual harassment, from Phil that continued on and on and on, from the diabetes situation. It was -- as I said before, I felt like a horse that would -- just kept getting beaten over and over and over. It didn't matter how much I tried or how much I tried to make that situation better, it was unbearable" (Ex. 9, at 254).

Further detailing of facts is reserved for argument.

STANDARD OF REVIEW

Under Rule 56(c), a moving party is entitled to summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." FRCP 56(c). The party moving for summary judgment is initially responsible for identifying those portions of the factual record which it believes establish that there are no genuine issues of material fact. Once the moving party has made this showing, the opposing party must demonstrate, by reference to affidavits, depositions, answers to interrogatories, or admissions, that a triable issue of fact exits. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986). The court must determine whether the movant has demonstrated "'that there is an absence of evidence to support [claimant's] case.'" EEOC v. Clay Printing Co., 955 F.2d 936, 940 (4th Cir. 1992) (citing Celotex, 477 U.S. at 325, 106 S.Ct. at 2554). In evaluating a summary judgment motion, the court must view the facts and draw reasonable inferences in the light most favorable to the nonmoving party. *See* Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249-50, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986) (citations omitted). Special caution must be exercised when the disposition of an issue turns on a determination of intent. Morrison v. Nissan Co. Ltd., 601 F.2d 139, 141 (4th Cir. 1979). Thus, while summary judgment is available in cases alleging employment discrimination, it should be applied with caution "because the crux of a Title VII dispute is the 'elusive factual question of intentional discrimination.'" Lowe v. City of Monrovia, 775 F.2d 998, 1009 (9th Cir. 1986) (citing Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248, 255 n.8, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981)).

Summary judgment should be used only when there is no dispute of fact and there exists only one conclusion; all evidence must point one way and be susceptible of no reasonable inferences sustaining the position of the non-moving party. Johnson v. Minnesota Historical Society, 931 F.2d 1239 (8th Cir. 1991). Any indication of discriminatory motive may suffice to raise a question that can only be resolved by the trier of fact. The movant is not entitled to a credibility finding at the summary judgment level. "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge." Reeves v. Sanders Plumbing Products, Inc., 530 U.S. 133, 151, 120 S.Ct. 2097, 147 L.Ed.2d 105 (2000) (citing Liberty Lobby, 477 U.S. at 255). Bellofatto, as the non-moving party, is entitled to all inferences on credibility. Stalter v. Wal-Mart Stores, Inc., 195 F.3d 285 (7th Cir. 1999); Lust v. Sealy, Inc., 383 F.3d 580, 582-83 (7th Cir. 2004) ("There is no presumption that witnesses are truthful."). As the United States Supreme Court has explained, "[i]t is only when the witnesses are present and subject to cross-examination that their credibility and the weight to be given their testimony can be appraised. Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'" Poller v. Columbia Broad. Sys., Inc., 368 U.S. 464, 473 (1962). And, as recently reiterated by the Supreme Court, it is error for the district court to fail "to adhere to the axiom that in ruling on a motion for summary judgment, '[t]he evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in h[er] favor.'" Tolan v. Cotton, 134 S. Ct. 1861, 1863, 188 L. Ed. 2d 895, 897 (2014) (quoting Liberty Lobby, 477 U.S. at 255).

ARGUMENT AND AUTHORITIES

A. The Evidence Raises Triable Questions of Fact With Respect to the Hostile Work Environment Claim; Summary Judgment is Therefore Precluded.

Defendant wants this Court to try this case without the benefit of a trial. Red Robin misconstrues the standard of review on summary judgment. Nowhere in defendant's brief does defendant view the evidence in light most favorable to, and draw inferences in favor of, plaintiff as is required by Rule 56. Liberty Lobby, 477 U.S. at 249-

50, 106 S.Ct. at 2511. To the contrary, defendant dismisses *factual* evidence offered by plaintiff and others and focuses only on evidence that it deems to favor its position. It is readily apparent based on the evidence offered thus far in this case that there are material questions of fact with respect to the sexual harassment claim.

At this stage, it is defendant's burden to establish that there are no genuine issues of material fact with respect to all of the elements of a hostile work environment claim, that is, (1) that the plaintiff "was subjected to unwelcome conduct; (2) the unwelcome conduct was based on sex; (3) the conduct was sufficiently pervasive or severe to alter the conditions of employment and create a hostile work environment; and (4) some basis exists for imputing liability to the employer." *See* Pitter v. Cmty. Imaging Partners, Inc., 735 F. Supp. 2d 379, 393 (D. Md. 2010) (citing Smith v. First Union Nat'l Bank, 202 F.3d 234, 241-42 (4th Cir. 2000)). In a co-worker harassment case, "[l]iability may be imposed if the employer had actual or constructive knowledge of the existence of a hostile working environment and took no prompt and adequate remedial action." Amirmokri v. Baltimore Gas & Elec. Co., 60 F.3d 1126, 1129 (4th Cir. 1995); *see also* Paroline v. Unisys Corp., 879 F.2d 100, 106 (4th Cir. 1989).

1. *The Young Female Employees, Including Bellofatto, Did not Welcome Phil Seller's Patently Offensive Sexual Advances.*

Defendant has asserted, without citation to any authority, that this element has a temporal aspect to it (Def. Br. at 22-23). To the contrary, all that is required of plaintiff is to offer evidence — taken in the light most favorable to plaintiff — that through her conduct she demonstrated that she experienced unwelcome harassment while working at Red Robin. *See, e.g.*, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 68, 106 S. Ct. 2399, 2406, 91 L. Ed. 2d 49, 60 (1986). Moreover, defendant ignores plaintiff's testimony that she was harassed continually by Phil Sellers, continually told him to stop, and continually reported his conduct. It is true that not long after Bellofatto went to work for Red Robin Sellers grabbed her hair from behind, stuck his face right beside hers and said into her ear, "I bet you like it when your boyfriend pulls your hair," and then days later slapped her on the butt with a tray (Ex. 9, at 123-25). But even after that, Sellers *continued* to try to hug Bellofatto, put his arm around her, hit on her, and used sexual references to refer to her (Id. at 120, 128, 143, 256, 258-59). As Bellofatto plainly stated, this "continued throughout [her][] entire employment there" (Id. at 256).

Bellofatto clearly made it aware that this treatment was unwelcome by consistently telling Sellers not to touch her and pushing him off when he tried (Id. at 120, 259). Moreover, Bellofatto also reported the harassment to management and HR on multiple occasions (Ex. 3; Ex. 4, at 62-69; Ex. 9, at 104, 106, 112, 256). Defendant's attempt to ignore this *factual* evidence, especially at this stage of the proceedings, is unavailing — there is no question that the conduct in question was unwelcome.[16]

2. *The Harassment was Directed Only Towards Young Females at Red Robin.*

Again, defendant ignores plaintiff's evidence, and misconstrues plaintiff's burden, with respect to this element. The record provides overwhelming evidence that many young females, including Bellofatto, were sexually harassed by a male employee, Phil Sellers. There is absolutely no evidence that Phil Sellers touched male employees' butts at Red Robin, that he pulled male employees' hair and told them that he bets they like it when their boyfriends do that, that he told male employees that he wanted to lay down

[16] As will be later shown, there is also no question whatsoever that Red Robin permitted a work environment to exist at its restaurant in Christiansburg, Virginia that was hostile and offensive to young working women, including Alex Bellofatto.

and taste them, that he told male employees that they had nice rear ends, that he offered to curl male employees' hair because he thought it was sexy, that he offered to "work things out" with male employees if they were short on money, that he asked male employees if they were virgins, that he told male employees that their butts looked so squishy in the jeans they wore to work, that he called male employees sweetie, honey, and beautiful, or that he pinched male employees' stomachs.

As the Fourth Circuit has recognized, "the jury's 'because of sex' finding is easily sustained." Ocheltree v. Scollon Prods., 335 F.3d 325, 332 (4th Cir. 2003). When the harasser's conduct is particularly offensive to women, or intended to provoke women, this prong is easily satisfied. Id.; *see, e.g.*, Freeman v. Dal-Tile Corp., 750 F.3d 413, 421 (4th Cir. 2014) (noting that a reasonable jury could find the "because of sex" element met where evidence showed that plaintiff's coworker frequently discussed his sexual exploits, showed pictures of women to plaintiff and others, and frequently made lewd comments, and discussed having sex with a co-worker's daughter). In fact, "[w]hen someone sexually harasses an individual of the opposite gender, a presumption arises that the harassment is 'because of' the victim's gender. This presumption is grounded on the reality that sexual conduct directed by a man, for example, toward a woman is usually undertaken because the target is female and the same conduct would not have been directed toward another male." Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 752 (4th Cir. 1996) (citing Barnes v. Costle, 561 F.2d 983, 990 (D.C. Cir. 1977) (plaintiff "became target of her superior's sexual desires because she was a woman . . . . No male employee was susceptible to such an approach")). And, as the Fourth Circuit has recognized, "'the critical inquiry is whether the plaintiff's environment was hostile …

'because of' her sex' and not solely on whether the conduct was directed at the plaintiff." Mayor of Baltimore, 429 Fed. Appx. at 200-01 (quoting Hoyle v. Freightliner, LLC, 2011 U.S. App. LEXIS 6628, at *19 (4th Cir. 2011); citing Ocheltree, 335 F.3d at 332 (finding that conduct in the work place, including conversations between male co-workers, satisfied the "because of" requirement since it "was particularly offensive to women and was intended to provoke [the claimant's] reaction as a woman"); Petrosino v. Bell Atl., 385 F.3d 210, 222 (2d Cir. 2004) ("The fact that much of this offensive material was not directed specifically at [the claimant] … does not, as a matter of law, preclude a jury from finding that the conduct subjected [the claimant] to a hostile work environment based on her sex."). Thus, Bellofatto has clearly created at the very least a question of fact with respect to this point as many females complained of sexual harassment by a male employee at Red Robin — and no males complained (*see, e.g.*, Ex. 11, at 42-43).

3. *The Evidence supports a Finding that The Harassment was Severe or Pervasive.*

Next, the evidence supports a finding that the harassment was severe or pervasive. The hostile work environment claim analyzes the *entire* environment at Red Robin — not isolated incidents viewed in disaggregated fashion as suggested by defendant on brief. Thus, whether the harassment was severe or pervasive depends on everything that happened at Red Robin: "'[N]o single factor is' dispositive, Harris, 510 U.S. at 23, as '[t]he real social impact of workplace behavior often depends on a constellation of surrounding circumstances, expectations, and relationships which are not fully captured by a simple recitation of the words used or the physical acts performed[.]'" EEOC v. Cent. Wholesalers, Inc., 573 F.3d 167, 176 (4th Cir. 2009) (quoting Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 82, 118 S. Ct. 998, 140 L. Ed. 2d 201 (1998)). Thus, "the court must examine 'the social context in which particular behavior occurs and is experienced by its target.'" Johnson v. Scott County Sch. Bd., 2013 U.S. Dist. LEXIS 153977, at *10 (W.D. Va. Oct. 28, 2013) (quoting Oncale, 523 U.S. at 81). "There is no question that gender-based comments and epithets, when used pervasively in the workplace, can meet the standard for severe or pervasive harassment." Passananti v. Cook County, 689 F.3d 655, 668 (7th Cir. 2012); *see also* Williams v. GMC, 187 F.3d 553, 562-63 (6th Cir. 1999) (evidence of sexually related remarks, foul language, and mean and inequitable treatment by co-workers gave rise to a jury question, because impact of separate successive incidents may accumulate to create hostile environment).

As is readily apparent, it is improper to consider each offensive event in isolation as defendant has done here. *E.g.*, Jackson v. Quanex Corp., 191 F.3d 647, 660 (6th Cir. 1999) ("[T]he very meaning of 'environment' is 'the surrounding conditions, influences or forces which influence or modify" (citation omitted)). Instead, the Court must consider the totality of the circumstances. Spriggs v. Diamond Auto Glass, 165 F.3d 179, 184 (4th Cir. 1999). "We are, after all, concerned with the 'environment' of workplace hostility[.]" Id. (citing Walker v. Ford Motor Co., 684 F.2d 1355, 1359 n.2 (11th Cir. 1982) ("The fact that many of the epithets were not directed at [the plaintiff] is not determinative. The offensive language often was used in [his] presence."); Hicks v. Gates Rubber Co., 833 F.2d 1406, 1415 (10th Cir. 1987) ("One of the critical inquiries in a hostile environment claim must be the environment. Evidence of a general work atmosphere therefore -- as well as evidence of specific hostility directed toward the plaintiff -- is an important factor in evaluating the claim.").

> [T]he totality-of-circumstances test must be construed to mean that even where individual instances of sexual harassment do not on their own

> create a hostile environment, the accumulated effect of such incidents may result in a Title VII violation. This totality-of-circumstances examination should be viewed as the most basic tenet of the hostile-work-environment cause of action. Hence, courts must be mindful of the need to review the work environment as a whole, rather than focusing single-mindedly on individual acts of alleged hostility. As one court has noted:
>
>> The [severe or pervasive] analysis cannot carve the work environment into a series of discrete incidents and measure the harm adhering in each episode. Rather, a holistic perspective is necessary, keeping in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created thereby may exceed the sum of the individual episodes.

GMC, 187 F.3d at 563 (quoting Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1524 (M.D. Fla. 1991)). Thus, "[i]rrespective of whether a plaintiff was aware of the other incidents, the evidence is highly probative of the type of workplace environment she was subjected to, and whether a reasonable employer should have discovered the sexual harassment." Sandoval v. Am. Bldg. Maint. Indus., 578 F.3d 787, 802 (8th Cir. 2009). As the Eighth Circuit has explained, "[w]hen judging the severity and pervasiveness of workplace sexual harassment, . . . harassment directed towards other female employees is relevant and must be considered." Id. at 802-03 (citing Hall v. Gus Constr. Co., 842 F.2d 1010, 1014-15 (8th Cir. 1988) ("We also reject appellants' contention that the district court erroneously considered all of the women's claims together in determining that the harassment was sufficiently pervasive and severe . . . .")); *see also* Griffin v. City of Opa-Locka, 261 F.3d 1295, 1301 (11th Cir. 2001) (evidence of alleged harasser's sexual harassment of other women who worked with him may be relevant to show defendant had a custom or policy of being indifferent to women), cert. denied, 535 U.S. 1034 (2002); Loring v. Universidad Metropolitana, 190 F.Supp.2d 268, 271-72 (D.P.R. 2002) (evidence of university employee's sexual harassment of female students relevant to proving an employee's sexual harassment claim that university administration knew or should have known that university administrator was acting in a way that created hostile work environment); Hurley v. Atlantic City Police Dep't, 174 F.3d 95, 110-12 (3rd Cir. 1999) (evidence of sexual harassment of others of which plaintiff did not have personal knowledge relevant to considering whether employer's asserted reasons for its actions were a pretext for discrimination); Perry v. Ethan Allen, Inc., 115 F.3d 143, 151-52 (2nd Cir. 1997) ("Evidence of the harassment of women other than [plaintiff] but not known to [plaintiff], if part of a pervasive or continuing pattern of conduct, was surely relevant to show the existence of a hostile environment . . . and would have been found probative of the company's notice of that environment."); Alexander v. ALCATEL NA Cable Systems, Inc., 2002 CO4 2776, at *21 (4th Cir.) (unpubl.) ("The district court deemed irrelevant evidence that the employer had failed to investigate and check harassment of other women . . . . This was error. An employer, whose tepid reaction to complaints of abusive behavior emboldens would-be offenders, may be liable for failing to prevent subsequent harassment.").

It is thus reversible error to consider the evidence "in a disaggregated fashion" as defendant has done on brief. Harris v. Forklift Sys., Inc., 510 U.S. 17, 126 L. Ed. 2d 295, 114 S. Ct. 367 (1993) (compelling a "totality of the circumstances" test); Conner v. Schrader-Bridgeport International, Inc., 227 F.3d 179, 193 (4th Cir. 2000). For example, the Fourth Circuit in Ziskie v. Mineta, 547 F.3d 220 (4th Cir. 2008) reversed an award of summary judgment for an employer and held that it was error to exclude evidence of the employer's treatment of other women. Ziskie, 547 F.3d at 227 (citing Spriggs, 242 F.3d at 184; Jennings v. University of North Carolina, 482 F.3d 686, 696 (4th Cir. 2007) (*en* *banc*); E.E.O.C. v. Sunbelt Rentals, Inc., 521 F.3d 306, 317 (4th Cir. 2008)). As the Fourth Circuit reasoned,

> The district court's rejection of the affidavits submitted by Ziskie's co-workers regarding conduct not witnessed by Ziskie is inconsistent with the principles expressed in these cases. When examining all the circumstances of a plaintiff's workplace environment, evidence about how other employees were treated in that same workplace can be probative of whether the environment was indeed a sexually hostile one, even if the plaintiff did not witness the conduct herself. Hostile conduct directed toward a plaintiff that might of itself be interpreted as isolated or unrelated to gender might look different in light of evidence that a number of women experienced similar treatment.
>
> Of course, conduct experienced by the plaintiff may well be more probative of a hostile workplace than is conduct the plaintiff did not herself witness. But that goes to the weight evidence should be given, not its relevance or admissibility. A blanket refusal to consider conduct not witnessed by the plaintiff is inconsistent with the Federal Rules of Evidence and Civil Procedure.
>
> …
>
> The Rules of Evidence thus adopt a presumption in favor of admitting relevant evidence, and leave it up to the finder of fact to assign it proper weight. This approach is preferable to per se restrictions cordoning off certain types of evidence from district court consideration; such limitations are inconsistent with the proper relationship between appellate and trial courts.

Ziskie, 547 F.3d at 225.

Here, looking at all of the evidence, there is no question that the harassment at Red Robin was pervasive. Simply considering the things that were reported the *first* time Sellers was reported to HR would be sufficient,

> Q. The first note is from a Kourtni Knobel in Christiansburg. Is that the woman you were telling us about earlier?
> A. It is, yes, sir.
> Q. There's a reference, "Phil, server." Is that Phil Sellers?
> A. Yes, it is.
> Q. All right. Then you write, "Gone to managers three times, and he's been spoken to." Is that what Kourtni Knobel told you?

A. Everything within my notes is what the team member told me, so yes.

. . .

Q. All right. Read the next language for me, please. Begins with the word "tried," I think.
A. "Tried asking her out" -- again, this is what Kourtni is telling me. "Tried asking her out. Said no on the hospo. stand. And he asked, 'Why don't you want to date me? Because I'm black?' He said, 'I won't be mad at you if you hug me,' nine months ago."

. . .

A. "He hugs on team members, new girls, but don't remember who."

. . .

A. Again, these are Kourtni's -- what she's telling me. "Don't know how recent these things are. Resolution: More respect for women. Heard him make comments about women in his section."

. . .

A. Okay. Again, Kourtni is informing me, "Did you see the ass on her? He likes big women and would totally do her. Anything else? Not that she's witnessed. Confidentiality and anti-retaliation. Just wants him to be appropriate to women, not necessarily fired."

. . .

Q. All right. The next page is your notes again and the conversation with David. Is that David Maranto, the manager?
A. It is, yes, sir.
Q. All right. And it's dated October 19, 2012. And did he tell you that he had heard things in the past?
A. He did.
Q. About Phil Sellers?
A. Correct.

. . .

Q. What's the next thing? I can't read it. "He's" --
A. -- "loud and boisterous."
Q. Okay. And what's the next line say?
A. "Some team members have taken offense."
Q. Just read the rest of that, please.
A. "Talked with Phil previously. No documentation because it wasn't first-hand knowledge. Last incident was closing server said he spoke with her poorly. Was about three weeks ago. Guests love him and give tons of compliments."

Q. So David told you that he had heard things in the past, that some team members had taken offense, that he had talked with Phil previously, and that there was no documentation because none of this was first-hand knowledge, correct?
A. That is correct.

. . .

Q. The next entry is for Amanda Johnson. She was a female employee, correct?
A. She was.

. . .

Q. And read what you wrote down there, please.
A. "Confidentiality and anti-retaliation. Get along with everyone. No one has touched me. Phil said things, asked her to hang out after work. She made it clear she's not interested, about two months. Took a few times for him to stop, but he did." And again, this is a reflection of what Amanda is telling me.

. . .

Q. All right. Next page, Tawney Vaught. She was a female server at Red Robin in Christiansburg?
A. Don't remember if she was a server, but she was a female team member, yes, sir.
Q. All right. About the middle of the page, you record that Tawney said, "Some people complain about Phil."
A. Yes, sir.

. . .

Q. Now, Tawney told you that Phil said, "I would sleep with you. Sometimes when I'm having sex, I think of you." And you agree that's completely inappropriate?
A. Those are rude and inappropriate comments, yes.

. . .

Q. Okay. Now, below that, you say the word "Heather," and read down to your last line there, please, to your line.
A. "Heather, just transferred. Alex Bellofatto. Anything else? No."
Q. So you -- so you must have asked Tawney, Give me -- can you give me some other names I might ought to talk to? Is that why Heather and Alex is there?
A. That is correct, yes, sir.

. . .

Q. Now, next, Alex Bellofatto. You spoke with her on the 22nd of October, it looks like?
A. I did, yes, sir.

. . .

A. Alex told me -- it says, "Phil says things. 'I want to lay down and taste you.' Hits on team members. 'Your boyfriend is lucky to have you. You're so sexy.'"

. . .

A. "Sexually assaulted. Grabbed her hair and said, 'I bet you like it when your boyfriend pulls your hair,' mid-June of 2012."
Q. Let me stop you right there just a moment. When you learned that information, tell me again why Phil Sellers was not fired?
A. That's her definition of sexually assaulted. That's Alex's words, not mine.

. . .

Q. Oh. All right. What's the next thing you said? "He" --
A. "He hit her on the butt with a tray. Will Carrico, manager, saw this, mid-July of 2012."
Q. And the next thing you said, "She's" something --
A. "She's told all the managers, and they said they'll talk with David."

. . .

Q. Okay. So you write there, "He asked" -- that -- those two lines.
A. "He asked CDT out on his first day. Heather, Richmond, transferred there."
Q. Okay. And the next line says, "Asked" something?
A. "Asked Holly, 'Are you a virgin?'"

. . .

Q. The next line, you say, "Emily." Emily. And then what do you -- what do you write there?
A. "Told her Alex and him were dating. Convinced her to meet him for ice cream to train her."
Q. And then there's something about Tawney. What do you write there?
A. "Tawney, 'I want to lay down and taste you.'"

. . .

Q. The next page, again, recording your conversation with Alex. You begin writing -- and you've got something in quotes. Read those three lines, please.
A. "'If money is a problem, we can work something out,' told to Alex."

. . .

A. "Think all the managers know, and they've said they'll talk with David."

. . .

> A. "He'll harass new team members. He acts up and hits on new hires."

(Ex. 4, at 40-69). As Bellofatto related, Sellers continuously harassed many young females at Red Robin, trying to hug them, putting his around them, calling them derogatory names, and making sexual comments to them (Ex. 7, at 65; Ex. 9, at 120, 128, 143). For instance, Sellers told Amanda Johnston, another female server at Red Robin, that "I would tell you about the dreams that I have of you but you have a boyfriend" (Ex. 10, at 5, 8). And, Sellers followed Tawny Vaught, another female server, into the parking lot one day and tried to kiss her (Ex. 9, at 23). Sellers continuously harassed Vaught at work and asked her out (Id.). Not surprisingly, Sellers was reported to HR a second time (Ex. 3). During this report, Laura George complained that Sellers was making "sexual comments to her and he's told him to stop and he hasn't. He's touched her stomach and her back. Been going on since she first met him, probably January 2013[;]" "[h]e offered her friend, Courtney Noble, $20 to curl her hair because I think it's sexy. Made her feel bad and he said it in front of everyone. He's loud and obnoxious about it. Courtney is leaving and it's a deciding factor of her decision[;]" said comments such as "[t]hose jeans make your butt looks so good in that, so squishy. You go to the club wearing miniskirts showing that booty off[;]" and touching her, "he'll take his fingers and tries to pinch her stomach in a way to say hi. Happened recently within the last couple weeks. Back - last few weeks. His touch is very different, not just behind as they are walking by, he keeps his hand there longer and it's uncomfortable" (Id.). Kourtni Knobel also explained, "[a] week ago, Phil kept making comments about one of the girls', Laura, butt and how he wanted to touch it[;]" "[n]ext to Laura when she told

Matt about the harassment and he was more concerned about Phil paying people to roll his silver[;]" "[h]ugs girls more than he did previously[;]" and he told her that he loved her and gave her a hug (Id.).

As Sellers put it, he is "aggressive when it come to, like, getting to know people" (Ex. 13, at 24). Tellingly, Sellers also came on to female customers. One manager recorded, "need to watch Philip, notice him giving his phone # to 2 girls sitting at the bar after talking to them a while" (Ex. 6). And while HR stated that such conduct was "plainly inconsistent with Red Robin policy" (Ex. 4, at 25), Sellers was unapologetic,

> Q Did you ever give your number to any girls at the bar?
> A As far as employees or customers?
> Q Well, let's start with customers. Did you ever give your number to any female customers at the bar?
> A Yeah, because they were my regular customers. But some girls would come in, they were cute, and I'd give them my phone number or they would give me their number or they would write -- because some people pay with credit cards, some people pay with cash. They would write their number on their credit card. I like to think I'm a handsome guy. I don't want to toot my own horn. But they would write their number down, "Hey, text me sometime. Next time I come in I'll sit in your section." You know, business as usual. It wasn't anything -- I wasn't trying to date them or anything. They would say, "Hey, you're cute. Here's my number. I'll text you to see if you're working so I can sit in your section. I don't want to wait too long." So, you know, stuff like that.
> Q Did Red Robin ever discipline you in any way, shape or form for giving your telephone numbers to female customers at the bar?
> A No. I don't even think sometimes they knew about that. I don't even know. It was like a -- it's not like I'm going back to the manager saying, "Hey, I got a number from Table 42," or something like that. It was just business. I don't even -- I don't know how that came up. I don't even know how would they know. I like to keep my business low key. Like, I don't kiss and tell. I don't get a number from a female that's coming in to dine with her family or her girlfriends and then go back and tell my coworkers, "Hey, I got a number." That's not my style.

(Ex. 13, at 27-28).[17]

Clearly there is sufficient evidence to create a question of fact as to whether the harassment was pervasive *or* severe. In fact, "[t]he required showing of severity or seriousness of the harassing conduct varies inversely with the pervasiveness or frequency of the conduct." Glorioso v. Aireco Supply, 1995 U.S. Dist. LEXIS 7071, at *15 (D. Md. Apr. 14, 1995) (quoting Ellison v. Brady, 924 F.2d 872, 878 (9th Cir. 1991)); *see also* Pryor v. United Airlines, Inc., 2014 U.S. Dist. LEXIS 52856, at *24 (E.D. Va. Apr. 16, 2014) ("After all, the standard is 'severe or pervasive' — phrased in the disjunctive — indicating that offending conduct must be assessed along a spectrum where severity and pervasiveness are to some degree inversely related."). "That is, a few severe incidents can create a hostile work environment, while lesser acts can also create such an environment if greater in number." Etefia v. East Baltimore Community Corp., 2 F. Supp. 2d 751, 758 (D. Md. 1998). And, as is clear, "there is no magic number of incidents an employee must allege. Etefia, 2 F. Supp. 2d at 758-59 (citing Daniels v. Essex Group, Inc., 937 F.2d 1264, 1274 (7th Cir. 1991)) (finding while severity was not met, pervasiveness was as plaintiff testified "albeit somewhat vaguely, that comments about his heritage 'kept going on and on'"); *see also* Richardson v. New York State Dep't of Correctional Serv., 180 F.3d 426, 438 (2d Cir. 1999) ("Reasonable jurors may well disagree about whether [the incidents at issue][] would negatively alter the working conditions of a reasonable employee. But the potential for such disagreement renders summary judgment inappropriate."). And, as the Seventh Circuit has noted, "context

[17] While according to HR, such conduct would be "inconsistent with Red Robin policy," management in Christiansburg never reported the conduct to HR in Colorado (Ex. 4, at 25). Moreover, management never even addressed it with Sellers (Ex. 13, at 28).

matters, and it will often present a jury question." Passananti, 689 F.3d at 668-69. Thus, "[w]hether the harassment was sufficiently severe or pervasive to create a hostile work environment is 'quintessentially a question of fact'" for the jury [citation omitted] as is the issue of the plaintiff's credibility." Conner, 227 F.3d at 199-200. Summary judgment here is therefore inappropriate.

Ocheltree v. Scollon Productions, Inc., 335 F.3d 325 (4th Cir. 2003) (*en banc*), is instructive. The evidence at trial in Ocheltree included only comments that were sex-based, discussions concerning sexual exploits, and depiction of sex acts using mannequins. Id. at 328-29. Citing Harris and Faragher, the Fourth Circuit held that "a reasonable jury could find" that the conduct at issue was "sufficiently severe or pervasive to alter the conditions of Ocheltree's employment and to create an abusive work environment." Id. at 333. In fact, even without touching which is present here, "'[w]hen the workplace is permeated with discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment, Title VII is violated.'" Oncale, 523 U.S. at 78 (citing Harris, 510 U.S. at 21 (citations and internal quotation marks omitted)); *see also* Harris, 510 U.S. at 19, 23 (evidence that harasser subjected plaintiff to sexual innuendos, sex-based insults, and comments could support a finding of unlawful sexual harassment); Walker v. Thompson, 214 F.3d 615, 626 (5th Cir. 2000) (verbal intimidation, ridicule, and insults may be sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment that violates Title VII).

Furthermore, "the fact that the law requires harassment to be severe or pervasive before it can be actionable does not mean that employers are free from liability in all but the most egregious of cases." Richardson, 180 F.3d at 439 (citing Torres v. Pisano, 116 F.3d 625, 631-32 (2d Cir. 1997), cert. denied, 522 U.S. 997 (1997)). "[T]he 'appalling conduct' alleged in prior cases should not be taken to 'mark the boundary of what is actionable.'" Harris, 510 U.S. at 22. The cases cited by defendant do not change this. Moreover, the cases cited by defendant are easily differentiated from the facts here.

For instance, in Hopkins v. Baltimore Gas, 77 F.3d 745 (4th Cir. 1996) the Court was analyzing male on male harassment, and the evidence in that case did not involve any sexual propositions or sexual touching. Here, even ignoring everything else that Sellers did to Bellofatto and other young female employees, Hopkins differs from the case at bar because here Sellers grabbed plaintiff's hair from behind while making an overtly sexual comment, and he hit her on the buttocks with a tray.

Likewise, in Shaver v. Dixie Trucking Co., 181 F.3d 90 (4th Cir. 2002), the facts consisted of essentially only two hugs that were not connected to any sexual reference. Shaver v. Dixie Trucking Co., 1999 U.S. App. LEXIS 9862, at *8 (4th Cir. May 21, 1999). In contrast here, Sellers continually made sexual comments and touched female employees in a sexual way (*E.g.*, Ex. 3; Ex. 9, at 143-44). Moreover, Shaver is an unpublished opinion.

Likewise, Call v. Shaw's Jewelers, Inc., 2000 U.S. App. LEXIS 7329 (4th Cir. Apr. 21, 2000) is an unpublished opinion. Additionally, the plaintiff there was complaining that more attractive females were called sweetie and honey, were hugged and kissed, and were favored because they were attractive. Plaintiff here is complaining that she was subject to a hostile work environment because her and other female employees were subjected to unwelcome touching and sexual comments by a male server. She is not complaining that she was treated worse because Sellers was not attracted to her.

Finally, unlike Lorenz v. Fed. Express Corp., 2012 U.S. Dist. LEXIS 116464 (W.D. Va. Aug. 17, 2012),[18] the case at bar is not about one woman complaining about a few incidents of harassment. The evidence here supports a finding that Red Robin permitted a work environment to exist at its restaurant in Christiansburg, Virginia that was hostile and offensive to young working women. Here, the evidence set forth *supra* at 11-20 compels a finding that the harassment in question was pervasive or severe, and that Red Robin was well aware of the harassment and did nothing to stop it. The undisputed evidence here compels a finding that female servers complained repeatedly about Sellers' unwanted sexual advances to management and that management did absolutely nothing to stop it. Kourtni Knobel recalled specifically that she had "gone to mgrs 3X" and that Sellers had "been spoken to" (Ex. 2, at 406), and Laura George recalled that she had "mentioned it to managers before — Matt, and he didn't do anything about it" and that she had "heard that he's been spoken with before, not sure why he's still doing this" (Ex. 3). The evidence also compels a finding that no fewer than five women reported severe or pervasive harassment ("I would sleep with you; sometimes when I'm having sex I think of you; I want to lay down and taste you; and if money's a problem we can work something out" (Ex. 1)) to Red Robins' corporate human resources officer in October 2012 who confirmed that the harassment had taken place; and stunningly, Red Robin in response did not suspend or terminate Sellers' employment, demote him, or discipline

[18] Defendant also cites to Walker v. Mod-U-Kraf, LLC, 988 F. Supp. 2d 589 (W.D. Va. 2013). Walker is currently on appeal and was argued before the United States Court of Appeals for the Fourth Circuit on October 28, 2014. No opinion has been issued yet.

him in any way, and instead put him right back to work side-by-side with his victims; and that not surprisingly given Red Robins' anemic response, the harassment not only continued, it got worse — according to one server, as of March 2013 Sellers "hugs girls *more than he did previously*" (Ex. 3) [Emphasis added]. The evidence here is therefore distinguishable from Lorenz and is more than sufficient to support a finding that the harassment was severe or pervasive, and that Red Robin knew or should have known that it was taking place.

Additionally, under Title VII, in order to show that the harassment unreasonably interfered with the plaintiff's work performance, "the plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment. The employee need only show that the harassment made it more difficult to do the job.'" GMC, 187 F.3d at 567 (citing Davis v. Monsanto Chem. Co., 858 F.2d 345, 349 (6th Cir. 1988)); *see also* Whidbee v. Garzarelli Food Specialties, Inc., 223 F.3d 62, 70 (2d Cir. 2000) ("[T]he test is whether 'the harassment is of such quality or quantity that a reasonable employee would find the conditions of her employment *altered for the worse*'" (quoting Torres, 116 F.3d at 632) [Emphasis in original]); Harris, 510 U.S. at 25 (Scalia, J., concurring) ("[T]he test is not whether work has been impaired, but whether working conditions have been discriminatorily altered."); Id. (Ginsburg, J., concurring) ("'[T]he plaintiff need not prove that his or her tangible productivity has declined as a result of the harassment.' Davis, 858 F.2d at 349. It suffices to prove that a reasonable person subjected to the discriminatory conduct would find, as the plaintiff did, that the harassment so altered working conditions as to 'make it more difficult to do the job.'"). And, it is not necessary that the plaintiff be hospitalized as a result of a nervous breakdown before the harassment becomes actionable under federal law,

> But Title VII comes into play before the harassing conduct leads to a nervous breakdown. A discriminatorily abusive work environment, even one that does not seriously affect employees' psychological well-being, can and often will detract from employees' job performance, discourage employees from remaining on the job, or keep them from advancing in their careers.

Harris, 126 L.Ed.2d at 302. As the 9th Circuit has noted,

> Sexual or gender-based conduct which is abusive, humiliating, or threatening violates Title VII even if it does not cause diagnosed psychological injury to the victim. Harris, 126 L.Ed.2d at 371. It is enough, rather, if such hostile conduct pollutes the victim's workplace, making it more difficult for her to do her job, to take pride in her work, and to desire to stay on in her position.

Steiner, 25 F.3d at 1463.

Here, plaintiff testified that the work environment was difficult because of the harassment (Ex. 9, at 120). And, she testified that it affected her psychological well-being and that she would have sought treatment if she could have afforded to do so (Id. at 270-71). And, she did not want to stay in her position, at least in part, due to the sexual harassment, "I was so miserable there from everything, from Glenn, from the sexual harassment, from Phil that continued on and on and on, from the diabetes situation. It was -- as I said before, I felt like a horse that would -- just kept getting beaten over and over and over. It didn't matter how much I tried or how much I tried to make that situation better, it was unbearable" (Id. at 254). Thus, when the totality of the circumstances are actually considered rather than ignored, and especially when taken in the light most favorable to plaintiff, it is evident that questions of fact remain as to the sexual harassment claim and thus summary judgment must be denied.

4. *There is a Basis to Hold Red Robin Liable.*

Contrary to defendant's view, Red Robin did not "promptly investigate" the sexual harassment. Defendant on brief ignores all of the complaints to management at Red Robin in Christiansburg, VA. The law does not require that females being harassed in Christiansburg, Virginia call HR in Colorado rather than bringing it to the attention of the manger on duty at their local place of employment. To the contrary, in a co-worker harassment case, "[l]iability may be imposed if the employer had actual or constructive knowledge of the existence of a hostile working environment and took no prompt and adequate remedial action." Amirmokri, 60 F.3d at 1129; *see also* Paroline, 879 F.2d at 106.

Without restating the evidence *seriatim*, the record establishes plainly that the general manager had actual knowledge of the harassment and did nothing ("heard things in the past;" "some tms have taken offense") (Ex. 2, at 408). One server stated, "gone to mgrs. 3X & he's been spoken to" (Id., at 406). Therefore the first time management received a complaint, it did nothing. And the second time management received a complaint, it again did nothing. And the third time management received a complaint, it again did nothing. Another server also recalled that "some people complain about Phil" (Id., at 410). Bellofatto also recalled that "she's told all mgrs. & they said they'll talk w/ David [Maranto]" (Id., at 413). Little did Bellofatto know that Maranto was well aware of the harassment and did nothing.

Continuing, when Bellofatto reported that Sellers had hit her on the butt with a serving tray to Will Carrico, Carrico responded that he had continually tried to talk with the general manager about issues with Sellers harassing female servers, to no avail (Ex. 9, at 104, 117). Bellofatto also reported that she was having issues with Sellers to other managers, “but it just kind of got dismissed in general” (Ex. 9, at 112). And as stated, Knobel also told HR when she reported the harassment that local management had been approached three times already (Ex. 2). Knobel also went to Glen Leidich and said she was having trouble with Phil and did not know what to do “she wanted it to stop” (Ex. 11, at 28, 30). Laura George then went to him shortly thereafter (Id. at 31). Leidich at least gave the females HR’s number but still failed to take any action himself (Id. at 35). He claims he told the general manager, Dave Maranto, about the harassment, but Maranto denies this ever happened (Id. at 36). Matt Pero also became aware of Phil Sellers making inappropriate jokes and touching Laura George’s rear yet did nothing more than note in the Captain’s Log that the complaint gave him a “headache” (Id. at 66).[19] And, Bellofatto reported this same occurrence to Jan Dilling herself, but nothing was done (Ex. 3; Ex. 7, at 67). Not to mention, when HR spoke to general manager David Maranto, he admitted that he had heard things in the past and knew that employees were offended by Sellers’ conduct towards them — yet Sellers was never disciplined (Ex. 2). Moreover, Sellers was not punished even after HR was contacted (Ex. 12, at 22). In fact, management was not even told to keep an eye on Sellers (Ex. 7, at 38; Ex. 11, at 39). It was not until at least three more months of complaints to local management, and a *second* call to HR, that Sellers was finally terminated.

[19] Matt Pero acknowledged that he was supposed to pass the report on to his supervisor (Ex. 7, at 37). HR later counseled him on getting involved when he learns of sexual harassment (Ex. 4, at 114; Ex. 7, at 17-18, 120). Pero also learned through the Captain’s Logs (daily reports used by the managers at Red Robin) that Phil was giving his number out to customers, but he did not do anything to correct the situation (Ex. 7, at 75).

Kristy Boyd in HR acknowledged that the harassment should have been reported to her early on by management (Ex. 4, at 115). Moreover, once HR was contacted, Boyd conducted her "investigation" telephonically from Colorado rather than travel to Virginia and trusted whatever her managers told her — regardless of the fact that she had employees coming to her complaining that they had reported sexual harassment to management and nothing was done,

A. I trust my managers to tell me the truth.
Q. You trust them to tell the truth, correct?
A. Yes, sir.
Q. Do managers ever let you down?
A. Sometimes they make some different decisions.

(Ex. 4, at 49). The evidence therefore supports the inescapable conclusion that corporate HR put far too much trust in local management. For instance, corporate HR assumed that Sellers was talked to about giving his phone number to girls at the bar since management took the time to note it in the Captain's Log (Ex. 4, at 26-27). However, Sellers testified that he was never talked to about this — he did not even realize that someone saw him (Ex. 13, at 29-30). Boyd, though, decided to trust her management and never even met any of the victims in Christiansburg, Virginia because "[i]f I had to talk to everybody in person, I would never be home *and would be flying nonstop across the country to conduct investigations*" (Ex. 4, at 32) [Emphasis added]. Red Robin's failure here is not a defense to plaintiff's sexual harassment claim; rather it is an indictment of Red Robin's employment practices, and the fact that Red Robin has determined, at the corporate level, that it is inconvenient and not cost-effective to travel on-site to one of its restaurants to meet with the victims of sexual harassment is evidence of an inadequate investigation and a dysfunctional anti-harassment policy. As Boyd recognized, there is obvious value in conducting investigations face to face as opposed to by telephone — especially when it comes to determining whether someone is lying (Ex. 4, at 31). To this day she cannot recall her impression of Sellers after talking with him by telephone (Id. at 78). Furthermore, Boyd readily admitted that there were many things that she should have looked into further but neglected to do so (*E.g.*, id. at 42). And, she never followed up with the females after she ended her "investigation" (Id. at 90).

Here as in Smith v. First Union Nat'l Bank, 202 F.3d 234 (4th Cir. 2000), the trier of fact may well find that Red Robin's anti-harassment policy was "'defective or dysfunctional,'" Id. at 245, and thereby impose liability on Red Robin. Here as in Smith, Red Robin "did not take any steps to prevent sexual harassment," "did not exercise reasonable care to correct promptly [the] harassment," and that "[p]erhaps due to [an] inadequate investigation of [the] complaints … allowed [the harasser] to remain in his position." Id. at 245-46. Here as in Smith, the jury may well conclude that instead of taking adequate remedial measures to prevent or stop the harassment, Red Robin instead put Bellofatto and Sellers' other victims in harm's way. In addition, employing the familiar negligence standard with respect to the fourth element of the hostile environment claim, the evidence supports a finding that the Red Robin had actual or constructive knowledge of the existence of a hostile working environment and took no prompt and adequate remedial action. Summary judgment is therefore precluded.

B. The Evidence Also Raises Triable Questions of Fact With Respect to the ADA Claim; Summary Judgment is Therefore Precluded.

It is well-established that one form of unlawful discrimination under the ADA is the failure to provide a reasonable accommodation for a known disability of a qualified applicant or employee. 42 U.S.C. § 12112(b)(5)(A); 29 C.F.R. § 1630.9 (a). In a failure-to-accommodate case, a plaintiff establishes a prima facie case by showing

> "(1) that [s]he was an individual who had a disability within the meaning of the statute; (2) that the [employer] had notice of h[er] disability; (3) that with reasonable accommodation [s]he could perform the essential functions of the position . . . ; and (4) that the [employer] refused to make such accommodations."

Rhoads v. Fed. Deposit Ins. Corp., 257 F.3d 373, 387, n. 11 (4th Cir. 2001) (quoting Mitchell v. Washingtonville Cent. Sch. Dist., 190 F.3d 1, 6 (2d Cir. 1999)); *see also* Billings v. Stonewall Jackson Hosp., No. 6:08-CV-010, 2009 WL 2240374, at *4 (W.D. Va. July 13, 2009) (quoting Rhoads, 257 F.3d at 387, n. 11); Labrecque v. Sodexho USA, Inc., 287 F. Supp. 2d 100, 106 (D. Mass. 2003). It is well-established that the questions concerning disability, qualification, and accommodation each require an individualized inquiry. *E.g.*, Bragdon v. Abbott, 524 U.S. 624, 641-42 (1998); Labrecque, 287 F. Supp. 2d at 106.

1. *The Evidence Supports a Finding That Bellofatto's Type 1 Diabetes Substantially Limits Her in One or More Major Life Activities.*

Bellofatto was diagnosed with Type 1 diabetes, juvenile onset in 2007. As many courts have held, Type 1 diabetes will virtually always substantially limit a major life activity under ADAAA. Ray v. North Am. Stainless, Inc., 2014 U.S. Dist. LEXIS 34737 (E.D. Ky. Mar. 18, 2014); Tadder v. Bd. Of Regents of the Univ. of Wis. Sys., 2014 U.S. Dist. LEXIS 49557 (D. Wis. 2014) (noting that diabetes is almost always a disability post-ADAAA); *see also, e.g.*, EEOC v. Res. for Human Dev., Inc., 827 F. Supp. 2d 688, 694 (E.D. La. 2011) ("Diabetes is covered by the ADA because it 'substantially limits the endocrine system'" (quoting 29 C.F.R. § 1630.2)); Wiloughby v. Connecticut Container Corp., 2013 WL 6198210, at *9 (D. Conn. Nov. 27, 2013) (citing EEOC regulations and noting that diabetes, which by definition impact endocrine functioning, could easily be found to be a disability); Equal Empl. Opportunity Commision v. Walgreen Co., 2014 U.S. Dist. LEXIS 52061 (N.D. Cal. Apr. 11, 2014) (denying defendant's motion for summary judgment for failure to accommodate plaintiff's disability, diabetes); Rednour v. Wayne Twp., 2014 U.S. Dist. LEXIS 134319, at *29-30 (S.D. Ind. Sept. 24, 2014) ("Here, the parties do not dispute that Plaintiff's type 1 diabetes constitutes a 'disability' within the meaning of the ADA" (citations omitted)). The case cited on brief by defendant, Schneider v. Giant of Maryland, LLC, 389 F. App'x 263, 268 (4th Cir. 2010), to support their proposition that Bellofatto's diabetes does not constitute a disability is decided under the law *prior* to the ADAAA, "The ADA was amended effective January 1, 2009, after this suit was filed. *See* ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553. Congress did not expressly intend for these changes to apply retroactively, and so we must decide this appeal based on the law in place prior to the amendments." Schneider, 389 Fed. Appx. at 267, n.3 (citations omitted). This case, however, was clearly filed after the ADAAA was in effect. Thus the cases cited by defendant do not reflect the current law, "Virtually all of the case law cited by defendant for the proposition that plaintiff fails to demonstrate that she has or is perceived as having a disability predates the enactment of the ADAAA, and the continued validity of such cases is suspect." Barrett v. Bio-Medical Applications of Md., Inc., 2013 U.S. Dist. LEXIS 38596, at *28 (D. Md. Mar. 19, 2013). In fact, the ADAAA significantly changed the inquiry with respect to whether an individual has a disability,

> [T]he ADA, as amended by the ADAAA, requires that the "definition of disability in [the ADA] shall be construed in favor of broad coverage," 42 U.S.C. § 12102(4)(A), and provides specifically that the "determination of whether an impairment substantially limits a major life activity shall be

> made without regard to the ameliorative effects of mitigating measures such as . . . [medication, medical supplies, or] equipment, ..." Id. § 12102(4)(E)(i). "In effect, these provisions require courts to look at a plaintiff's impairment in a hypothetical state where it remains untreated." Lloyd v. Hous. Auth. of City of Montgomery, 857 F. Supp. 2d 1252, 1263 (M.D. Ala. 2012). Thus, under the ADAAA, the fact that plaintiff was able, according to defendant, to travel to and from work and perform the functions of her job without substantial limitation, through the use of a cane, does not resolve whether she has a "disability" within the meaning of the ADA. The relevant question is whether plaintiff's mobility would be substantially limited without a cane.

Id. at *27-28.

Moreover, the evidence demonstrates, at the very least, a question of fact as to whether Bellofatto has a disability. Bellofatto was treated for her Type 1 diabetes by Dr. Elizabeth Parker at Children's National, Division of Endocrinology and Diabetes, from 2007-2013 when she relocated (Dr. Elizabeth Parker Declaration, Exhibit 16). As Dr. Parker explains, "[d]iabetes substantially limits endocrine function and affects major life activities such as seeing, working, thinking and concentrating." Bellofatto takes insulin several times a day to regulate her blood sugar levels. Additionally, she also must eat or drink something if her sugar is too low. As manager Matt Pero acknowledged, diabetes can affect every aspect of a person's life and the consequences can be serious if not dealt with properly (Ex. 7, at 110-11). Bellofatto was well aware of this and did everything that she could to help control her disability. The issue, however, was that her employer was not permitting her to do so. Thus, it is not as if Bellofatto could just take medicine in the morning and control her diabetes throughout the day. Instead, she needed an accommodation when her blood sugar dropped to deal with it right then. Thus, Bellofatto does have a disability under the Act.

2. *Red Robin Does Not Deny That it Had Notice of Bellofatto's Disability.*

Red Robin does not deny that it had notice of Bellofatto's disability. As Bellofatto testified, she told the general manager, Dave Maranto, that she had Type 1 diabetes during her interview (Ex. 9, at 146-47). And as explained by others, Bellofatto made it well known at work that she had diabetes (Ex. 10, at 6-7; Ex. 11, at 69).

3. *With a Reasonable Accommodation Bellofatto Could Perform the Essential Functions of Her Position.*

Under the ADA, the reasonable accommodation process may be initiated by an employee's request. Fleetwood v. Harford Sys., 380 F. Supp. 2d 688, 701 (D. Md. 2005); Bryant v. Better Bus. Bur. of Greater Md., 923 F. Supp. 720, 737 (D. Md. 1996) (citing 29 C.F.R. §1630.9, at 414 (Appendix: Interpretative Guidance)). It is well-settled, however, that where the disabled individual's need for accommodation is obvious or the employer is otherwise on notice of his or her need for accommodation, a separate "request" by the individual is not required. Walter v. United Airlines, Inc., No. 99-2622, 2000 WL 1587489, at *4 (4th Cir. Oct. 25, 2000) (employer must have been aware of plaintiff's disability to be liable for failing to provide an accommodation); Sydnor v. Fairfax County, No. 1:10cv934, 2011 WL 836948, at *10-11 (E.D. Va. Mar. 3, 2011) (where plaintiff was in a wheelchair at the time, making it obvious that she needed one, she was not required to make a specific request for a wheelchair as an accommodation); *see also* Lafever v. Acosta, Inc., No. C10-01782 BZ, 2011 WL 1935888, at *4 (N.D. Cal. May 20, 2011) (obligation to accommodate arises once employer becomes aware of need to consider accommodation). Once an individual has requested a reasonable accommodation or the employer has become aware of the need thereof, the employer is *required* to make a reasonable effort to determine the appropriate accommodation. 29

C.F.R. pt. 1630 app.; Humphrey v. Mem. Hosps. Ass'n, 239 F.3d 1128, 1137 (9th Cir. 2001); Bryant, 923 F. Supp. at 737. Human resources manager Kristi Boyd acknowledged that once Red Robin learned that Bellofatto had diabetes, it had an obligation to engage the interactive process to determine whether an accommodation could be made (Ex. 4, at 16, 59). If the necessary accommodation is obvious and reasonable, an employer is obliged to provide it, and its failure to grant the accommodation is a *per se* violation of the requirement. *See* Gile v. United Airlines, Inc., 213 F.3d 365, 373-74 (7th Cir. 2000) (defendant violated ADA where it took no action other than to reject employee's request and subsequently terminate her); Fleetwood, 380 F. Supp. 2d at 701 (something more is required if it is not immediately obvious what accommodation would be appropriate); *see also* Sydnor, 2011 WL 836948, at *10-11 (accommodations for wheelchair obviously needed); Lomax v. DaimlerChrysler Corp., 243 S.W.3d 474, 481 (Mo. Ct. App. 2007) (defendant admittedly never considered whether plaintiff could be accommodated, precluding summary judgment).

Here, Bellofatto asked for the most basic accommodation for a diabetic during her interview — to allow her to check her blood sugar as needed, and if she had low blood sugar, to sit down and eat or drink something (Ex. 9, at 149). With this simple accommodation, she could do her job. The general manager, Dave Maranto, at the time stated that would not be a problem (Id.). Obviously plaintiff's requested accommodation was reasonable — as Dave Maranto put it, "she's not asking for the world" (Ex. 12, at 64). His words, however, were not put into effect. She was continuously denied a break when needed and made the same request repeatedly. As Bellofatto told the managers throughout her employment, all she needed was some time to sit down and eat,

> "You know, there's one of two ways this will go. Sometimes I'll just need a drink of Coke and it's totally okay and I'm fine, and sometimes I really need to sit down and eat, and I'll let you know if that happens." And I did [request a break], and they totally ignored it. . . . I made this clear multiple, multiple, multiple times. I need to sit down and physically eat something[.]

(Ex. 9, at 157). She would tell them this "[a]nytime [she][] had a low blood sugar and [] couldn't get a break" (Id.).

The requirement to engage in an interactive process is not a one-time mandate but, rather, a continuing obligation on the employer to take some initiative in identifying and honoring a reasonable accommodation. Both parties have a duty to attempt to find a reasonable accommodation and to act in good faith. Crabill v. Charlotte Mecklenburg Bd. of Educ., 423 F. App'x 314, 322-24 (4th Cir. 2011). The employer's duty, therefore, continues even if the employee fails to suggest an accommodation that the employer finds reasonable — or suggests something that the employer views as unreasonable. Brown v. Dunbar Armored, Inc., Civ. No. 08-3286 (JBS/AMD), 2009 WL 4895237, at *3 (D.N.J. Dec. 10, 2009); Fleetwood, 380 F. Supp. 2d at 701. And, an accommodation is reasonable unless the employer can demonstrate that it would impose an undue hardship on the employer. Lockhart v. Chao, 2004 WL 2827018, at *3 (W.D. Va. Dec. 9, 2004) (citing 42 U.S.C. § 12112(b)(5)(A)). Importantly, an employer who fails or refuses to provide an accommodation clearly acts in bad faith, and the employer has violated the statutory requirement to provide a reasonable accommodation. *See* EEOC v. Life Techs. Corp., Civ. Act. No. WMN-09-2569, 2010 WL 4449365, at *8 (D. Md. Nov. 4, 2010).

4. *Red Robin Refused to Honor Such Accommodation.*

Despite Red Robin's suggestion to the contrary, defendant did refuse to provide Bellofatto with a reasonable accommodation. It is absolutely untrue that Bellofatto only identified a single incident where she requested a break. Again, Bellofatto did recall a specific incident at deposition,

> [T]here was one time I was told that -- I asked Matt Pero, I said, "Can I have a break? I have a double. I need to go eat something or I'm going to pass out." And he was, like, "Well, what was your bev PPA this morning?" And he looked at my bev PPA, which is an average of how much I had sold beverage-wise and it wasn't over a certain range that he wanted. So he just totally disregarded me and walked away. And when I asked again, he wasn't going to give me one. I didn't get one until the p.m. manager showed up that night.

(Ex. 9, at 150). But, even Matt Pero's note to management concerning this incident made it obvious that this was not the first time this had occurred,

> "Until she learns to control her diabetes better, *any long shifts* she has only ends up with her in tears complaining about her blood sugar being too high or too low. I completely understand the seriousness of diabetes and the need to control it, but she clearly is not taking the proper steps here. It does me no good when my closing server is crying from the minute the door's locked until she leaves. *We see the same behavior* when she works a double. It seems to me that we need to keep her to short, volume-only shifts."

(Ex. 7, at 108) [Emphasis added]. This statement clearly supports a finding that this had happened before. And, at deposition Pero recalled Bellofatto asking for breaks both before and after this incident occurred (Ex. 7, at 114-15). And, the Captain's Logs reiterate that this was true, "Alex wasn't feeling so hot today. She said that Sunday when her sugar dropped dramatically that it has made her feel weak and tired" (Captain's Log 11.13.12, Exhibit 17; *see also* Captain's Log 11.27.12, Exhibit 18 ("Alex complained tonight about working a double and being tired . . . whined about being here all day to Meredith so Meredith closed for her.")). And, Bellofatto testified that it in fact happened all the time,

> There were times when I would just ask, like, "Hey, I really need to order something and eat something. Can I do that?" It didn't matter. It was,

> "No, you've got tables. No, you need to get back on the floor. We'll phase you later. We'll deal with this later." I was, like, "No, I need to deal with this right now."

(Ex. 9, at 151). Additionally, Bellofatto's complaint to HR made clear that this was not an isolated event, as she told Boyd that she is "not allowed to have a break when she has low blood sugar" and she "just needs to eat." And, she had "told all mgrs & nothing was done until Glen transferred from Roanoke" (Ex. 2). Bellofatto was denied a break so many times, she felt like she "was beating a dead horse with a stick on the diabetes issue" (Ex. 9, at 244).

Furthermore, Bellofatto admits that she tried to deal with her diabetes as best she could without formally requesting a break. When she was either denied a break or could not find a manager to ask for a break, she did what she could do to get through the shift,

> So it just got to the point where I'd ask and people would ignore me or say no. And it just got to the point where I just did whatever I had to do so I didn't pass out. Whether it be force myself through to the end of the shift and then finally, whenever I was let go off my shift, go out and eat, or whether it was somebody was nice enough to give me a basket of fries or drink enough cups of soda to get through the end of my shift. I mean, the word break is used so liberally here. I mean, if I'm saying I need a break, I'm saying as Alex I need to sit down and eat. But I feel like breaks in general are being used to summarize me taking two seconds to drink a cup of soda.

(Id. at 187-88, 207). As Bellofatto explained, these were not actually "breaks" and were not sufficient,

> It wasn't really a break. I think that's where the miscommunication is. It wasn't the kind of break I was requesting, to sit down and eat something. It was the kind of break where it wasn't really a break. It was just me drinking soda and dealing with it, yes. I never got to just eat if I needed to just eat, yes.

(Id. at 208). Furthermore, this was not the product of Red Robin providing her an accommodation, and instead resulted in Bellofatto being yelled at, which eventually escalated into threats to cut her hours, "[a]nd then after a certain while, I would start getting pulled into the office, off of the clock, and that's when they started to threaten to cut hours, because I was told I was an emotional wreck who didn't know how to control her disease" (Id. at 161).

Bellofatto recognizes that some of defendant's affiants state that they never saw Bellofatto denied a break.[20] However, at the summary judgment stage, the conflicts in the evidence merely create a question of fact given Bellofatto's testimony, the Captain's Log noting that she would be in tears by the end of her shift due to her diabetes, the documented reports she made to HR prior to even filing a lawsuit, and her physicians declaration explaining that Bellofatto informed her while working for Red Robin that she was being denied breaks.

Contrary to defendant's suggestion, it is a reasonable accommodation to take a break when required for diabetes. Other employees recognizing that Bellofatto was required to wait to take a break is in fact admitting that she was not being given a reasonable accommodation. A diabetic simply cannot wait until she is already sick from low blood sugar before she takes a break to try to raise it.

C. The Evidence Raises Triable Questions of Fact With Respect to the Retaliation Claim; Summary Judgment is Therefore Precluded.

Next, under the familiar McDonnell Douglas burden-shifting approach, to establish retaliation there must be a question of fact as to whether "(1) [] [Bellofatto] engaged in protected activity, (2) [] an adverse employment action was taken against her, and (3) [] there was a causal link between the protected activity and the adverse employment action." Laughlin v. Metro Washington Airports Auth., 149 F.3d 253, 258 (4th Cir. 1998) (citing Hopkins v. Baltimore Gas & Elec. Co., 77 F.3d 745, 754 (4th Cir. 1996)); *see also* Felix v. Sun Microsystems, Inc., 2004 U.S. Dist. LEXIS 7508, at *54 (D. Md. Apr. 12, 2004). "The burden of establishing a prima facie case in a retaliation action is not onerous, but one easily met." Mickey v. Zeidler Tool and Die Co., 516 F.3d 516, 526 (quoting Nguyen v. City of Cleveland, 229 F.3d 559, 563 (6th Cir. 2000); *see also* Dixon v. Gonzales, 481 F.3d 324, 333 (6th Cir. 2007) ("The burden of proof at the prima facie is minimal; all the plaintiff must do is put forth some credible evidence that enables the court to deduce that there is a causal connection between the retaliatory action and the protected activity.")). Moreover, while there must be a question of fact as to whether her protected activity was *a* but-for cause of the alleged adverse action, but-for causation does *not* require a showing that an impermissible motive was the *sole cause* of the challenged action. Burrage v. United States, 134 S. Ct. 881, 888-89, 187 L. Ed. 2d 715 (2014).

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[20] Sarah McCraw is one of those affiants. She still works for Red Robin. She was to be deposed on November 10, 2014. Counsel for Red Robin confirmed on Friday, November 7, 2014 that she would appear for her deposition on Monday. She did not appear for her deposition. Later, she apparently signed a declaration for Red Robin on November 19, 2014.

i. Bellofatto Engaged in Protected Activity.

An employer may not "take adverse employment action against an employee for opposing discriminatory practice in the workplace." Laughlin, 149 F.3d at 259. "Using informal grievance procedures and informal protests, as well as voicing complaints in order to bring attention to an employer's discriminatory activities, are all protected opposition activities." DeMasters v. Carilion Clinic, 2013 U.S. Dist. LEXIS 133660, at *15 (W.D. Va. Sept. 17, 2013). Informal complaints are protected "'when they are made by the employee to the employer.'" Id. at *16 (quoting Pitrolo v. Cnty. of Buncombe, NC, No. 07-2145, 2009 WL 1010634, at *3 (4th Cir. Mar. 11, 2009) (citations omitted)). Bellofatto complained to her managers and to HR — complaints from the employee to the employer — that she was denied a reasonable accommodation for her diabetes pursuant to the ADA. Thus, Bellofatto plainly engaged in protected oppositional activity. *See, e.g.*, Felix, 2004 U.S. Dist. LEXIS 7508, at *55-56 (noting that it is unlawful "to discriminate against anyone who has opposed any practice made unlawful by" the ADA (citing 42 U.S.C. § 12203(a); 29 U.S.C. § 2615(a)(2))).

ii. Red Robin Responded By Cutting Bellofatto's Shifts and Giving Her Less Profitable Shifts.

In response to her complaints, Red Robin reduced Bellofatto's hours and assigned inferior shifts. Red Robin attempts on brief to deflect attention from its unlawful conduct and punish Bellofatto for working hard and picking up shifts to compensate for her reduced hours and her being assigned less profitable shifts. As Bellofatto testified, she was threatened that her hours were going to be cut due to her diabetes. *See supra* 8. And, her shifts were in fact cut. *See supra* at 8-10. On paper, she still worked approximately the same amount of hours — but, "it wasn't certainly from the help of management" (Ex. 9, at 226). Bellofatto "had to bend over backwards to pick up shifts. I used to be scheduled pretty okay shifts. I'd get, you know, four or five shifts a week, some weekends, some weekdays. And when all this started happening, I started getting nothing but weekday lunch shifts" (Id. at 209).[21] Then, after she was already assigned to work an inferior shift, she would show up and be assigned by management to work the less profitable section of the restaurant (Id. at 212). Cutting plaintiff's hours, especially coupled with scheduling Bellofatto to less profitable shifts and sections of the restaurant, is plainly an adverse employment action. *See, e.g.*, O'Neal v. City of Chicago, 392 F.3d 909, 911-12 (7th Cir. 2004) (finding that a reduction in hours could be an adverse action); Delp v. Rolling Fields, Inc., 2012 U.S. Dist. LEXIS 107414, at *20 (W.D. Pa. Aug. 1, 2012) ("Viewing the evidence in the light most favorable to the Plaintiff, we find that she has raised a triable issue of fact as to the allegedly adverse nature of her reassignment" (citing, *e.g.*, Klimczak v. Shoe Show Companies, 420 F. Supp. 2d 376, 382 (M.D.Pa. 2005) (reduction in scheduled hours can constitute an adverse employment action); Lidwell v. University Park Nursing Care Center, 116 F. Supp. 2d 571, 584 (M.D.Pa. 2000) (same); Hose v. Buca Restaurants, Inc., 2008 U.S. Dist. LEXIS 64792, 2008 WL 4000403 at *14 (W.D.Pa. 2008) ("Defendant fails to acknowledge that a reduction in hours can constitute an adverse employment action.")); Crady v. Liberty Nat. Bank & Trust Co. of Ind., 993 F.2d 132, 136 (7th Cir. 1993) ("A materially adverse change might be indicated by a termination of employment, a demotion evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation."). Defendant's actions were in fact the type of actions that "might have 'dissuaded a reasonable worker from making or supporting a charge of discrimination.'" Enoch v. Advanced Bioscience Labs., Inc., 2014 U.S. Dist. LEXIS 3354, at * 10 (D. Md. Jan. 10, 2014) (citation omitted). And again, while it might affect Bellofatto's compensatory damages, Bellofatto should not be punished for working hard to overcome defendant's adverse employment action. From Red Robin's perspective, Bellofatto would have a retaliation claim had she simply sat by and taken the adverse employment action. Instead, because she worked hard to pick up more shifts — and more profitable shifts — Red Robin maintains that Bellofatto has no retaliation claim. Red Robin's reasoning is obviously circular. The inquiry concerns Red Robin's actions, not what Bellofatto did in response to Red Robin's actions. A jury very well may find that Red Robin's actions, which would have clearly lead to a decrease in pay were it not for the actions of Bellofatto, constitute an adverse employment action.

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[21] The fact that Bellofatto was picking up shifts is noted in Red Robin's Captain's Logs (*e.g.*, Captain's Log 5.31.12, Exhibit 19; Captain's Log 6.19.12, Exhibit 20; Captain's Log 9.6.12, Exhibit 21; Captain's Log 9.14.12, Exhibit 22; Captain's Log 10.05.12, Exhibit 23; Captain's Log 10.18.12, Exhibit 24; Captain's Log 1.7.13, Exhibit 25; Captain's Log 1.29.12, Exhibit 26; Captain's Log 2.20.13, Exhibit 27).

iii. The Statements Made By Management Establish A Causal Connection.

In Burrage v. United States, 134 S.Ct. 881 (2014), the Supreme Court clarified that a claim of retaliation "require[s] proof that the desire to retaliate was [*a*] but-for cause of the challenged employment action." Burrage, at 888-89 (quoting University of Tex. Southwestern Medical Center v. Nassar, 133 S.Ct. 2517, 186 L. Ed. 2d 503 at 514 (2013)) [Alteration in original] [Emphasis added].[22] In fact, Judge Quarles for the United States District Court for the District of Maryland in Taylor v. Rite Aid Corp., 993 F. Supp. 2d 551 (D. Md. 2014), recently denied summary judgment in part on a Title VII and ADA discrimination and retaliation case, and explained that University of Texas

[22] *See* Burrage, at 888, Justice Scalia offers the following explanation:

> Thus, "where A shoots B, who is hit and dies, we can say that A [actually] caused B's death, since but for A's conduct B would not have died." LaFave 467-468 (italics omitted). The same conclusion follows if the predicate act combines with other factors to produce the result, so long as the other factors alone would not have done so- if, so to speak, it was the straw that broke the camel's back. Thus, if poison is administered to a man debilitated by multiple diseases, it is a but-for cause of his death even if those diseases played a part in his demise, so long as, without the incremental effect of the poison, he would have lived. *See, e.g.*, State v. Frazier, 339 Mo. 966, 974-975, 98 S.W. 2d 707, 712-713 (1936).

Southwest Medical Center v. Nassar, 133 S. Ct. 2517 (2013) does *not* require that the protected conduct be the "only" factor for the termination:

> Nassar requires a plaintiff asserting a retaliation claim to show that her "protected activity was *a* but-for cause of the" employer's adverse action. *Nassar*, 133 S. Ct. at 2534 [emphasis added in Taylor]. Nassar does not require that protected activity be the *only* factor that resulted in an adverse action, just that the adverse action would not have occurred without the protected activity. *See* Nassar, 133 S. Ct. at 2533 ("Title VII requires proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer."). Accordingly, Taylor's performance problems alone, even if they motivated the decision to terminate her in part, do not foreclose a retaliation claim under Nassar.

Taylor, 993 F. Supp. 2d at 567. As is clear, "but-for" does not mean "sole cause." *E.g.*, EEOC v. City of Greensboro, 2010 U.S. Dist. LEXIS 132159, at *33-35 (M.D.N.C. Dec. 14, 2010).

As the Fourth Circuit has noted, "[a] causal connection for purposes of demonstrating a *prima facie* case exists where the employer takes adverse employment action against the employee shortly after learning of the protected activity." Price v. Thompson, 380 F.3d 209, 213 (4th Cir. 2004); *see also* Taylor v. Republic Servs., Inc., 2013 U.S. Dist. LEXIS 132281, at *70 (E.D. Va. Sept. 16, 2013) ("To establish a 'but-for' causal relation … [a plaintiff] can prove a 'close temporal proximity' between the time the Company learned about her protected activity and her discharge" (citations omitted)); Williams v. Cerberonics, Inc., 871 F.2d 452, 457 (4th Cir. 1989) (three-month period of time found sufficient to prove causal connection in *prima facie* case).

Here, though, there is more than just temporal proximity. There is direct evidence — managers at Red Robin actually told Bellofatto that they were going to cut her shifts because of her diabetes, "[a]nd then after a certain while, I would start getting pulled into the office, off of the clock, and that's when they started to threaten to cut hours, because I was told I was an emotional wreck who didn't know how to control her disease" (Ex. 9, at 161). "So they would continually make these comments and it made me feel like they were going to cut my hours. . . . "Well, if you can't handle it, we'll cut your hours" (Id. at 176). As Bellofatto testified, "I was told to my face, we're going to start cutting your hours because of your diabetes. Because you don't know how to control your diabetes, we're going to start cutting your hours" (Id. at 209). Moreover, manager Matt Pero recorded this in the Captain's Log,

> Until she learns to control her diabetes better, any long shifts she has only ends up with her in tears complaining about her blood sugar being too high or too low. I completely understand the seriousness of diabetes and the need to control it, but she clearly is not taking the proper steps here. It does me no good when my closing server is crying from the minute the door's locked until she leaves. We see the same behavior when she works a double. It seems to me that we need to keep her to short, volume-only shifts.

(Exhibit 7, at 108; Ex. 8).

And, despite what Red Robin claims on brief, as explained *supra* at 55-56, management's threats eventually became reality, "[t]hey did cut my hours and I had to bend over backwards to pick up shifts. I used to be scheduled pretty okay shifts. I'd get, you know, four or five shifts a week, some weekends, some weekdays. And when all this started happening, I started getting nothing but weekday lunch shifts" (Ex. 9, at 209). Again, management became angry at Bellofatto when she reported the discrimination to Kristy Boyd in HR. The general manager responded,

> David pulled me into his office before one of my shifts, and he yelled at me. He was like, "What's this I hear about HR? What's this I hear you're telling people? What's this? What's that?" And he was like, "I need a specific example." And I provided a few examples of times I had not [been given a break], you know. Of course, I don't remember because it's been so long. . . . And he got very aggressive, very aggressive, very fast, very defensive, you know, and this is before I even get on the clock. This

> is before my 13-hour double shift on Black Friday. Yelling at me, saying I'm an emotional wreck who doesn't know how to control her disease, same old story he's been pulling, and that he's going to start cutting my hours if I don't control my disease better. And then he was like, "Admittedly, I don't know anything about your disease, but you need to learn how to control it better."

(Id. at 200-01). And, Maranto had the final approval over scheduling (Ex. 11, at 78).

Red Robin's claim that it took no adverse employment action against Bellofatto, rather than explaining why it cut her hours, is unavailing. Bellofatto has made out a prima facie case, and Red Robin has failed to offer a reason for cutting Bellofatto's hours and scheduling less profitable shifts. Thus, any reason now offered by Red Robin would clearly be pretext. For this additional reason, summary judgment must be denied.

CONCLUSION

In summary, material questions of fact preclude summary judgment. Plaintiff therefore requests entry of an order denying Red Robin's Motion for Summary Judgment.

Respectfully submitted,

ALEXANDRA BELLOFATTO

By /s/ *Terry N. Grimes*
Of Counsel

Terry N. Grimes, Esquire (VSB #24127)
Brittany M. Haddox, Esquire (VSB #86416)
TERRY N. GRIMES, ESQ., P.C.
320 Elm Avenue, S.W.
Roanoke, Virginia 24016
TELEPHONE: (540) 982-3711
FACSIMILE: (540) 345-6572
tgrimes@terryngrimes.com
bhaddox@terryngrimes.com
Of Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, and that a true and accurate copy of the foregoing was sent via the CM/ECF system to Alison D. Hurt, Esquire, LeClairRyan, Riverfront Plaza, East Tower, 951 East Byrd Street, Eighth Floor Richmond, Virginia 23219 this 9th day of December, 2014.

/s/ *Terry N. Grimes*
Terry N. Grimes